NO. 21384

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT M. SWAFFIELD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On January 19, 1966, the Federal Grand Jury for the Southern District of California, Central Division (now Central District of California) returned Indictment No. 35688 CD in four counts, charging appellant and his co-defendant, Stanley W. Stanick, as follows:

1. Count One charged a violation of Title 18, United States Code §371 (Conspiracy) and alleged inter alia that appellant and Stanick, together with one Grover G. Kreiger, Jr., an unindicted co-conspirator, and other individuals, conspired to

obstruct the lawful functions of the Securities and Exchange Commission and to commit violations of §§ 77q and 77x of Title 15, United States Code, by filing registration statements and amendments thereto, which contained material false statements about Universal Ecsco Corporation's financial condition and by causing Shinn Industries, Inc. securities to be sold to members of the public by means of false and misleading statements concerning the financial condition of Universal Ecsco Corporation, and its predecessor Ecsco (a partnership).

2. Counts Two, Three and Four charged violations of Title 15, United States Code §77x and alleged that appellant and Stanick knowingly and willfully caused false statements of material facts to be made in the registration statement and amendments thereto of Shinn Industries, Inc. which were filed with the Securities and Exchange Commission by appellant and Stanick. The false statements charged in Counts Two, Three and Four were the same and were as follows:

(a) That in the Statement of Income, the net loss of Ecsco (a partnership) for the year ended December 31, 1959, was stated as $1,169.00, when in fact, as defendants well knew, it was in excess of $125,000.00.

(b) That in the Statement of Financial Position, the contracts in process for the four months period ended August 31, 1960, were stated as $544,610.00, when in fact, as defendants well knew, the contracts in process were less than $175,000.00.

(c) That in the Statement of Income, the net

loss of Universal Ecsco Corporation for the period of four months ended August 31, 1960, was stated as $26,994.00, when in fact the net loss, as defendants well knew, for this period exceeded $395,000.00.

(d) That in the Statement of Financial Position, the retained earnings deficit of Universal Ecsco Corporation as of August 31, 1960, was stated as $26,944.00, when in fact, as defendants well knew, the deficit exceeded $395,000.00 [C. T. 2-15]. 1/

Count Two charged that the false statements were made in Amendment No. 1 to the Registration Statement of Shinn Industries, Inc. filed with the SEC on or about February 15, 1961.

Count Three charged that the false statements were made in Amendment No. 2 to the Registration Statement of Shinn Industries, Inc. filed with the SEC on or about March 24, 1961.

Count Four charged that the false statements were made in the post-effective Amendment No. 1 to the Registration Statement of Shinn Industries, Inc. filed with the SEC on or about April 6, 1961.

On March 7, 1966, appellant was arraigned and entered a plea of not guilty to all the charges in the indictment [C. T. 17]. On June 8, 1966, appellant and Stanick waived trial by jury and right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure [C. T. 62]. The

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1/ "C. T." refers to Clerk's Transcript.

court trial of appellant and Stanick commenced on June 27, 1966, before the Honorable Irving Hill, United States District Court Judge [C. T. 63].

At the close of the appellee's case on July 20, 1966, appellant and Stanick each made a motion for judgment of acquittal which motions were denied [C. T. 73]. At the conclusion of the trial on August 5, 1966, Judge Hill found appellant and Stanick guilty as charged on all counts [C. T. 83].

On August 15, 1966, appellant filed a motion for a new trial wherein he raised substantially the same issues that he now raises in his brief [C. T. 84 thru 100]. Appellee opposed said motion, and on August 26, 1966, after a hearing, Judge Hill denied the motion [C. T. 109].

Following the denial of appellant's motion for new trial, appellant and Stanick were each sentenced by Judge Hill to pay a fine of $1,250.00 on each of the counts One, Two, Three, and Four of the Indictment for a total of $5,000.00. The court further ordered that imposition of sentence was suspended as to imprisonment on each of counts One, Two, Three, and Four of the Indictment, and, appellant and Stanick were placed on probation on each of said counts for a period of three years [C. T. 110]. A timely notice of appeal was filed by appellant [C. T. 111].

On September 1, 1966, appellant filed an Application and Motion in Forma Pauperis requesting to be allowed to prosecute his appeal without prepayment of fees and costs [C. T. 112 thru 116]. On September 6, 1966, Judge Hill denied appellant's

request and certified under 28 U.S.C. Section 1915 that appellant's proposed appeal was not "taken in good faith and is frivolous. The grounds of the proposed appeal are the same grounds set forth in defendant's [appellant's] motion for a new trial which was considered and denied by the Court heretofore." [C.T. 117].

Thereafter appellant appealed to this Court and was permitted to prosecute his appeal in Forma Pauperis.

The United States District Court for the Southern District of California has jurisdiction of this case pursuant to Title 15 U.S.C. §§77x, 77q(a) and Title 18 U.S.C. §371. This court has jurisdiction to entertain this appeal pursuant to Title 28 U.S.C. §§1291 and 1294.

II

STATUTES INVOLVED

Title 18 U.S.C. §371, provides in pertinent part as follows:

> "If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 15 U.S.C. §77x, provides in pertinent part as follows:

> " ... any person who willfully, in a

registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 15 U.S.C. §77q(a) provides in pertinent part as follows:

"It shall be unlawful for any person in the offer or sale of any securities ... by the use of the mails, directly or indirectly --

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates ... as a fraud or deceit upon the purchaser."

* * *

III

BRIEF OF APPELLANT

At the outset appellee desires to call the attention of this Court to appellant's brief which, in appellee's opinion, does not comply with Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit for the following reasons:

1. Although appellant has a section labeled "Statement of Facts" numbering fifteen pages (pages 2 thru 16) in only one of the pages thereof (page 9) does he cite any reference to the Reporter's or Clerk's Transcript. Consequently, much of what appellant cites as having occurred at trial, or as part of the record does not appear to be part of the record and is in direct violation of Rule 10(2)(c) of this Court's rules which provide that the brief shall contain:

> "A concise ... statement of the case, presenting the questions involved and the manner in which they are raised with record references supporting each statement of fact or mention of trial proceedings." (Emphasis added)

2. This failure of Appellant to cite references to the transcript, pervades not only his "Statement of Facts", but also to a significant degree, that portion of his brief entitled "Argument" wherein, he purports to sustain his contentions of "Specifications of Error", pages 19 through 66 of Appellant's Brief.

3. Further, with regard to the specification of errors relied upon by appellant, Rule 18(2)(d) required that each alleged error shall "be numbered and set out separately" and when the

error is the admission or rejection of evidence the party shall quote the grounds of objection urged at trial and the substance of the evidence admitted or rejected. This rule was honored by appellant more in the breach thereof than the observance and this Court's attention is invited specifically to pages 56 and 57 wherein appellant therein cites merely the references to the transcript in approximately 31 separate instances without any reference whatsoever to the grounds urged at the time of trial, and the substance (even in part) of the evidence "admitted or rejected".

4. Rule 18(2)(c) of the Rules of this Circuit requires that:

> "A concise argument of the case (preferably preceded by a summary) exhibiting a clear statement of the points of law or facts to be discussed with a reference to the pages of record and the authorities relied upon in support of each point." (Emphasis added).

As will be noted from an examination of Appellant's Brief, it is for the most part at the end of his brief (pages 57 thru 66 thereof) that he cites authorities which he states "applies to the evidence in this case which has been substantially set forth in our argument." Thereafter follows a pell-mell reference to some 42 different cases, each citing or allegedly supporting a general statement of law which appellee in principle for the most part does not dispute, but which is in no way specifically related, directly or indirectly to appellant's argument.

IV

STATEMENT OF THE CASE

A. QUESTIONS PRESENTED

Appellant, on pages 17 and 18 of his brief, lists four general specifications of error. The first two allege respectively that the judgment of the court is not supported by any substantial evidence and that said judgment is contrary to the weight of the evidence. The third specification of error alleges that the trial judge committed error in certain of his rulings concerning grand jury testimony, restricting cross-examination of Government witnesses and errors in ruling on objections adverse to defendant and in enforcement of the stipulation regarding "Jencks Act statements." The fourth specification of error is quite general and entitled "The judgment is contrary to law". We have winnowed these specifications to the following questions which appear to be the issues which appellant seeks this Court to review:

1. Was the evidence sufficient to convict appellant of each of the four counts?

a. Does the evidence support the court's finding that appellant, in concert with his co-defendant Stanley W. Stanick and others, conspired to obstruct the lawful functions of the Securities and Exchange Commission and to commit violations of §§77q and 77x of Title 15 U.S.C. by filing registration statements, and amendment thereto, which contained materially false statements

about Ecsco and Universal Ecsco Corporation's financial condition?

b. Does the evidence support the Court's finding that appellant knowingly and willfully caused false statements of material facts to be made in the amendments to the registration statement of Shinn Industries, Inc., which were filed with the Securities and Exchange Commission on February 15, 1961, March 24, 1961, and April 6, 1961?

2. Did the Court commit prejudicial error in its rulings regarding production of Jencks Act statements, the grand jury testimony of Grover S. Krieger, in "restricting cross-examination by the appellant of government witnesses" or in its ruling regarding appellant's objections?

B. STATEMENT OF FACTS

1. INTRODUCTION

The thrust of this case revolves around a registration statement and amendments thereto of Shinn Industries, Inc. which were filed with the SEC[2/] on November 29, 1960, February 16, 1961, March 27, 1961, and April 6, 1961, Exhibits 1A, 1B, 1C, and 1D, respectively [R. T. 37]. [3/] The purpose of the registration

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2/ The registration statement was required to be filed pursuant to Section 5 of the Securities Act of 1933, 15 U. S. C. 77e.

3/ R. T. refers to Reporter's Transcript.

statements was to register 150,000 shares of Shinn Industries, Inc. common stock which was offered to the public at a total price of $900,000. In addition, there was registered inter alia, the following:

(a) $900,000 principal amount of 6% ten-year convertible subordinated debentures; and

(b) 112,500 shares of common stock initially issuable upon full conversion of the subordinated debentures; and

(c) $200,000 principal amount of 6% five-year convertible debentures. Exhibit 1E (page 1). [R. T. 37].

Shinn Industries, Inc. was in reality a holding company of Shinn Engineering, Inc. and Universal Ecsco Corporation Exhibit E (page 6). The false statements which form the basis for the indictment related to the understatement of losses and overstatement of inventory, denominated contracts in process, of Universal Ecsco Corporation and its predecessor partnership Ecsco. Said false statements are set forth in the registration statement and the various prospectuses, contained in the registration statement, under the heading of "Statement of Financial Position - Universal Ecsco Corporation" and "Statement of Income and Retained-Earnings Deficit", pages 44, 45, and 46 of Exhibit E [R. T. 37]. Copies of these pages are set forth herein as Appendix A. The printed figures reflected therein are the amounts which were stated in the registration statements. The penciled notations therein reflect the true and correct amounts which should have been stated therein and which were proven at trial.

2. THE BUSINESS OF ECSCO

In 1958, appellant and his co-defendant Stanick organized a partnership (wherein they were the sole partners) to engage in business as an engineering consulting firm. The partnership did business under the name of Ecsco and in early 1959 submitted bids to the U.S. Post Office Department for furnishing and installing a mechanized mail-flow system which received the incoming mail and sorted, stored and conveyed the mail within the post office, thus partially automating the traditional post office operations. Exhibit 1E (page 11) and Exhibit 5 (page 1). [R. T. 37]. In June, 1959, Ecsco was awarded two fixed price contracts with the U.S. Post Office. Exhibit 5 (pp. 1 and 7) [R. T. 35]. One of the contracts was for a post office in Kansas City, Missouri, on which Ecsco bid $494,204; the other contract was for a post office in Philadelphia, on which Ecsco bid $1,931,040, Exhibits 3A and 3B [R. T. 44].

Work commenced on the Kansas City job which was substantially completed and in operating condition by December, 1959, Exhibit 5 (p. 9) [R. T. 35]. Control Design & Fabricators, Inc ("Condeco"), a sub-contractor on the Kansas City job, was responsible for the controls portion of the Kansas City job, Exhibit 5 (p. 8). Work commenced on the Philadelphia job in the latter part of 1959, Exhibit 5 (p. 9), and the Philadelphia job was completed by the fall of 1961 [R. T. 1345]. Condeco was a joint venturer on the Philadelphia job and it was agreed that Condeco would receive $710,167.00 for its portion of the work on that job,

Exhibits 5 (p. 8), and 3B [R. T. 44].

On June 20, 1960, the Post Office Department awarded Ecsco (which had on April 30, 1960 incorporated as Universal Ecsco Corporation) three additional fixed price contracts for the installation of mechanized mail handling systems for post offices in New Orleans, Louisiana ($993,785), Houston, Texas ($2,510,579), and Portland, Oregon ($2,621,161), Exhibit 5 (p. 9).

Throughout the period of time that Ecsco was engaged in these post office contracts, it suffered from a chronic shortage of capital and was unable to fund its operations from internal sources [R. T. 1181, 1495, 1496, 1962, 1965, 2004], Exhibits 21A through ZZ and 22 [R. T. 2026]. The primary source of funds for operation was in the form of progress payments from the Post Office Department.

3. THE KANSAS CITY JOB

The Kansas City job (Ecsco's first major contract) [R. T. 1490], constituted practically all of Ecsco's business activities in 1959, Exhibits 8A, 8B, 10B, 11B [R. T. 370, 378, 387, 2380]. The contract provided that Ecsco would supply and install a mail-flow system in the Kansas City, Missouri, post office for the fixed sum of $494,200. Subsequent change orders increased the contract price to $509,676, Exhibit 3A [R. T. 44]. Ecsco in turn sub-contracted a major portion of this job to Condeco. The contract entered into between Ecsco and Condeco is dated July 29, 1959,

and stipulates that the sub-contractor (Condeco) "will provide all materials, labor, supervision, administration, tools, equipment, transportation, handling, storage, services, supplies, protection and all other items of expense for the performance and completion of the contract" and "do all the necessary electrical and their installation and construction to place a completely integrated conveyor system in operation" for a fixed base price of $202,907, Exhibit 17A [R. T. 1174]. Condeco performed its work as a sub-contractor on the Kansas City job [R. T. 1175] and in accordance with the terms of the July 29, 1959, Kansas City contract, Condeco billed Ecsco the full contract price, Exhibits 14D, 14E, 14F, 14G [R. T. 1176]. There being no question concerning the propriety of these billings, the invoices were recorded on Ecsco's books at approximately the time they were received [R. T. 502-506].

In October and November, 1959, Alfred D. Benson, President and owner of Condeco [R. T. 1164, 1165], repeatedly questioned appellant and Stanick concerning payment for the work that Condeco had performed on the Kansas City job [R. T. 1178, 1179]. Appellant and Stanick attempted to avoid speaking with Benson about the matter and referred Benson to Grover S. Kreiger, Jr., the "comptroller" of Ecsco [R. T. 1170]. In response to the question why Benson questioned Kreiger, Benson replied:

> "A Well, any time I would call, or call either in person or over the phone to try to find out when we were going to be paid, if I talked to either Stanick or Swaffield, they would always refer me to

Kreiger, saying he was the one that handled the money, and I had to see him because he knew all the details about when I was to be paid." [R. T. 1179]. Although Condeco's work on the Kansas City contract had been completed by November, 1959, only $50,000 had been paid on account by Ecsco [R. T. 1177, 1178]. By early December 1959, Benson threatened to take immediate legal action if Ecsco did not pay the $160,000 owed, Benson stated he would put Ecsco out of business [R. T. 1181].

Ecsco was in a financial crisis and Stanick, the co-defendant, was recalled from the Caribbean where he was vacationing to help solve the matter [R. T. 1346]. Being unable to pay the monies demanded by Condeco and after extended discussion, Ecsco (by its partners, appellant and Stanick) and Condeco (through its President, Benson) entered into an agreement dated December 16, 1959, Exhibit 17B [R. T. 1962] whereby Ecsco acknowledged its indebtedness to Condeco for the sum of $164,513.20, as the balance due on the Kansas City contract and agreed to pay Condeco $30,000 forthwith; Ecsco agreed that the balance due to Condeco ($134,513.20) be added to Condeco's portion ($710,167.00) of the payments to be made by the United States Government on the Philadelphia contract. The agreement also provided that in the event Condeco received less than the sum of $844,680.20 ($710,167.00 plus $134,513.20) from the Government, Ecsco would remain liable to Condeco for the amount not paid by the Government [R. T. 1183, 1184].

Although this agreement, Exhibit 17B, did not alter the fact that these costs for Condeco's work were incurred on the Kansas City job, in contemplation of public financing, and in order to show a more favorable financial picture, Appellant and Stanick, through Kreiger, ordered Harold Kavert, an accountant employed by Ecsco, to reverse approximately $129,435 [4/] of costs on the books which had previously been charged to the Kansas City job and to reduce the amount of accounts payable Condeco accordingly, Exhibit 14H [R. T. 511-518].

4. APPELLANT'S SEARCH FOR PUBLIC FINANCING

During late 1959 and early 1960 appellant and Stanick in an effort to obtain money to fund Ecsco sought public financing. They approached several underwriters in the New York area. Eventually they were referred to Myron A. Lomasney & Company [R. T. 1493, 1494].

At a meeting in New York with the Lomasney representatives during early 1960, appellant and Stanick presented them with

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4/ Computed as follows:

Balance owing to Condeco on Kansas City contract	$ 134,513.20
Less: Interest and discount not previously recorded on Condeco's books	5,077.43
	$ 129,435.77

financial statements (uncertified) of Ecsco for the year 1959, Exhibit 13A [R. T. 130].

This statement indicated, and appellant and Stanick represented, that Ecsco had a $191 loss in 1958 and a $37,282 profit in 1959. Appellant and Stanick conveniently neglected to mention their recent financial crisis with Condeco, their inability to respond to Ecsco's debts and the recent reversal of $129,435 on their books. Appellant and Swaffield projected sales of $4,875,000 and $1,200,000 respectively, Exhibit 13A [R. T. 126-130]. Additionally, Appellant and Stanick submitted a statement indicating a profit of $11,102 for the two months ended February 29, 1960, Exhibit 13B [R. T. 225]. Appellant represented to the Lomasney group that the Kansas City job was completed in 1959, and that the Philadelphia job would be completed in June or July of that year, 1960 [R. T. 123]. On the basis of these figures the Lomasney group expressed interest in the underwriting and Mr. Quing Wong, a representative of the Lomasney Company, was assigned to investigate Ecsco and to determine what interim financing was necessary to carry the company until public financing could be arranged. Appellant and Stanick told the Lomasney group that they needed about $200,000 interim financing [R. T. 136]. The Lomasney Company instructed Stanick and Swaffield to obtain a national firm of accountants to prepare certified financial statements [R. T. 129]. In April, 1960, Stanick and Swaffield, through Mr. Grover Kreiger, hired Ernst & Ernst to perform an audit for the period ended April 30, 1960 [R. T. 944].

On April 30, 1960, Universal Ecsco Corporation (hereinafter "Ecsco Corp.") acquired all the assets and assumed all the liabilities of the partnership and Ecsco ceased to function as a partnership. Appellant and Stanick were the corporation's sole stockholders. Upon formation of Ecsco Corp., appellant became President and Treasurer and a director of Ecsco Corp., and Stanick was Chairman of the Board of Directors, and William F. Price, the attorney for Ecsco Corp., was Secretary and the third member of the three man Board of Directors, Exhibit 5 (pp. 1 and 2 [R. T. 35]. Mr. Guy wilson was assigned by Ernst & Ernst as the senior accountant on the audit of Ecsco [R. T. 944].

5. THE AUDIT OF ECSCO CORP. IN THE SPRING OF 1960

The field work on the audit commenced in early April, 1960 [R. T. 955, 956]. In connection with the audit Wilson communicated with vendors and confirmed that the amounts owed per Esco's books agreed with the vendors' records. Wilson proposed to request such a confirmation from Condeco. Kreiger indicated that the amount shown on the books was correct and a confirmation should not be sent. Nevertheless, Wilson mailed a confirmation request to Condeco [R. T. 957]. Benson informed Wilson that Ecsco owed Condeco substantially more than the $5,000 reflected on Ecsco's books [R. T. 958]. Under these circumstances Wilson refused to proceed with the audit [R. T. 963, 1995].

Kreiger, acting on behalf of Swaffield and Stanick, communicated with Benson and asked him to sign a letter stating that Condeco had been paid in full for the Kansas City job [R. T. 1191, line 11 to 1192, line 3]. However, Benson refused to sign the confirmation because approximately $75,000 remained unpaid on the Kansas City contract [R. T. 1199, line 15 to 1200, line 1]. A few days later Kreiger called Benson again and said that Ecsco had a chance to get new financing and that they would be willing to pay Condeco what they owed on the Kansas City job if Benson would give him fictitious credit memoranda, invoices, revised instructions to the Post Office Department concerning payouts on the Philadelphia job, and a document rescinding the December 16, 1959 Agreement between Ecsco and Condeco, and if Benson would also sign a confirmation to Ernst & Ernst in the form presented to him [R. T. 1200 to 1222]. After some discussion, Benson agreed and supplied five blank invoices to Kreiger because he wanted to be paid what was due him on the Kansas City job [R. T. 1207 and 1219]. Kreiger then backdated and prepared the invoices (Exhibits 17-F, G, H, I [R. T. 1201-1206]) in such a fashion that they purported to reduce Condeco's charges on the Kansas City job by approximately $130,000 [R. T. 1204], and in turn Benson received the payment of $74,287 (the balance of the amount due), together with a copy of the false invoices.

Kreiger contacted Wilson who examined the false credit memoranda, Exhibit 17-F, which had previously been supplied by Benson to Kreiger [R. T. 945, 946 and 947], and in reliance upon

this document and the confirmation as to their authenticity from Condeco, completed the audit which reflected a loss of only $1,169 for the year ended December 31, 1959 [R. T. 1035, 1041]. Despite this machination to the books by Ecsco, the true loss on the Kansas City job was $130,604 [R. T. 948].

Prior to the completion of the audit by Ernst & Ernst, the Lomasney firm issued a letter of intent dated April 21, 1960, Exhibit 12A, agreeing to underwrite 200,000 shares of Common stock of Universal Ecsco Corporation at $4 per share, Exhibit 12A [R. T. 1517]. It was anticipated that this public offering would be made on or about September 1, 1960. In the interim the Lomasney firm was to use its best efforts to find purchasers for $200,000 of debentures convertible into Common Stock of the company at $2 per share. In late April, 1960, the first 100,000 of these debentures were placed with a client of Lomasney [R. T. 147-148]. The proceeds were used by Ecsco Corp. to cover bank overdrafts ($30,000) and to pay the $70,000 to Condeco.

In view of the time lag created by Wilson's refusal to continue with the audit, the audit period was changed from the two-month period ended February 29, 1960, to the four-month period ended April 30, 1960. After the audit report was completed by Guy Wilson for Ernst & Ernst, it showed a loss of $25,715 for this four-month period ended April 30, 1960 as well as a loss of $1,169 for the year ended December 31, 1959 [R. T. 146]. The report was transmitted to the Lomasney people [R. T. 146] and the $25,000 loss contrasted with appellant's and Stanick's previous

representation to the Lomasney firm that there would be a profit for that period [R. T. 147, 148]. The loss was explained by appellant as being due to the use of the completed contract method of accounting [R. T. 148, 149, 154]. Appellant and Stanick represented to the Lomasney people that the Philadelphia job would be completed prior to August 31, 1960, and at that time the financial statements would show a very substantial profit [R. T. 155]. The public issue was postponed by the Lomasney firm until after financial statements could be obtained which would give effect to the completion of the Philadelphia job and thus, per appellant's representation show a profit [R. T. 155]. In the meantime, the Lomasney firm provided the remaining $100,000 of interim financing [R. T. 156].

6. ALTERATIONS TO THE BOOKS PRIOR TO THE SECOND AUDIT

Appellant and Stanick were then instructed by Wong to obtain a certified financial statement for the four months ended August 31, 1960 [R. T. 156, 157]. Ernst & Ernst was again retained by appellant and Stanick to perform the audit. In August, 1960, prior to the commencement of Ernst & Ernst's audit, appellant instructed Harold Kavert (who had succeeded Kreiger, who was no longer with Ecsco Corp., as controller of Universal Ecsco) to prepare a statement showing the status of the Philadelphia job as reflected on

the books [R. T. 274]. From the books [5/] Kavert, on August 24, 1960, prepared a statement, Exhibits 14A and 14B [R. T. 282], which reflected that the books indicated a loss in excess of $345,000 on the Philadelphia job since May, 1960 [R. T. 291]. Kavert made an adjustment on the schedule for the Condeco item which was actually applicable to the Kansas City job but transferred to the Philadelphia job as described previously [R. T. 293 to 297]. The schedules, Exhibits 14A and 14B, in substance reflected a loss on the Philadelphia job as follows:

Loss per books 5-1 to 8-25	$ 345,000
Less profit taken to 4-30	123,000
Net loss on job	$ 222,000
Adjustment for Condeco which charges belonged on Kansas City job	$ 73,355
Net Loss	$ 148,710

This statement was presented by Kavert to appellant and Stanick in late August, 1960 [R. T. 278]. The Condeco item was specifically called to appellant's attention at this time [R. T. 295]. After appellant examined the schedules he became very upset and told Kavert that "he could not sell a stock issue based upon this statement" and instructed Kavert to reverse the charges to the

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5/ Exhibit 7A [R. T. 452], Exhibit 7B [R. T. 444], Exhibit 7D [R. T. 392], Exhibit 8A [R. T. 370 and 378], Exhibit 8B [R. T. 387], Exhibit 9A [R. T. 453], Exhibit 9B [R. T. 425], Exhibits 10A, 10B, 10C, 11A, 11B [R. T. 2380].

Philadelphia job and to allocate these costs to the new post office jobs (New Orleans, Houston, and Portland) [R. T. 280]. 6/

Kavert and his assistant, Roxanne Johnston (an employee of Ecsco Corp. who worked in the Accounting Department) then proceeded to make the required changes on the Company's books [R. T. 295]. Costs which had originally been charged to the Philadelphia job were now allocated to the New Orleans, Houston, and Portland jobs (none of these jobs had even been started yet) designated as inventory on these jobs. The charges to each of the three jobs was made by determining the percentage of the cost of each of the three new jobs to their bid price and apportioning the costs of the Philadelphia job to each of the new jobs by this percentage (40% of the Philadelphia charges for this period to Houston, 40% to Portland, and 20% to New Orleans) [R. T. 295, 305]. The reclassification in the books of original entry was achieved by eradicating the original column heading (Philadelphia) and substituting the letter "P. O." as a new column heading for the months of May, June, July, and August 24, 1960. Thereafter, all entries in the Purchase Journal that were made were made under the heading "P. O." [R. T. 298]. This new column was then summarized and broken down into three inventory accounts (New Orleans, Houston,

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6/ The New Orleans, Portland, and Houston Post Office contracts were awarded to Ecsco Corporation on June 20, 1960. Billings from Ecsco Corp. to the Post Office Department on each of the jobs commenced July 16, 1960. A schedule of all of the billings by Ecsco to the Post Office Department through August 31, 1960, on each of these jobs is set forth in the Pretrial Stipulation (p. 10), Exhibit 5 [R. T. 35].

Portland) and posted to the general ledger accordingly, Exhibits 8A and 8B [R. T. 297-367]. Other journal and ledger sheets, which could not be effectively altered, were replaced with new sheets and new entries were posted into the books accordingly, Exhibits 7B, 7D, 9B [R. T. 387-420, 435-445]. All postings thereafter made to the books reflected these changes, with the charges of the Philadelphia job being posted to these new jobs in accordance with the 40-40-20 ratio which Appellant approved [R. T. 448].

7. MISREPRESENTATIONS TO THE AUDITORS DURING THE SECOND AUDIT.

It was these altered books which were then shown to Ernst & Ernst who performed the audit for the four-month period ended August 31, 1960 [R. T. 761-764, 618, 619]. While engaged in that audit, Rodgers Dorr, a C. P. A. and the senior accountant assigned to the audit, noted that materials were being charged to the New Orleans, Houston, and Portland jobs on the books but that these materials were being shipped to Philadelphia [R. T. 772, 778]. Dorr raised a question concerning this [R. T. 778]. Kavert informed appellant that Dorr was questioning why materials were being shipped to Philadelphia and charged on the books to the three new jobs. Kavert testified:

"This purchase order showed on it the fact that it was a Philadelphia purchase order.

"I asked Mr. Swaffield what we were to tell

Ernst & Ernst. Mr. Swaffield told me that we were to tell them that this material was being assembled or sub-assembled in Philadelphia for the new post office jobs.

"Q. Did this conversation relate to a purchase order which had been allocated to a job other than Philadelphia?

"A. Yes, sir, it did. This purchase order was a true Philadelphia purchase order. It was of a substantial amount, is the reason Rodgers Dorr of Ernst & Ernst questioned it. I believe it was a link belt purchase order. I think it was in the amount of $46,000. This was a true Philadelphia Post Office expense [R. T. 457-458].

* * *

"A. According to the books this was being allocated on a pro rata basis to the three new post office jobs.

"Q. Was it in fact a charge to the Philadelphia job?

"A. It was in fact a Philadelphia cost." [R. T. 459].

Kavert then explained to Dorr that materials for the three new jobs were being sent to Philadelphia for sub-assembly and storage [R. T. 459, 789].

Dorr also discussed with appellant and Stanick the fact

that materials for the New Orleans, Houston, and Portland jobs were going back to Philadelphia for assembly and storage [R. T. 789, 794]. In this regard, Dorr asked appellant, as well as Stanick and Kavert, why Ecsco Corporation was not making progress billings (billings for the three new post office jobs) for these materials as "there was a substantial amount of costs being incurred and yet the progress billings were not substantial" [R. T. 792]. In response to these questions, Dorr was informed by appellant that the company could not bill the materials until such time as they were actually shipped from Philadelphia to the site of the three new jobs [R. T. 792].

These statements to Dorr by appellant (and by Kavert which appellant instructed Kavert to make) that the materials for these three new jobs (New Orleans, Portland, and Houston) were being shipped back to Philadelphia for storage and/or sub-assembly work were totally false. James Leonard, the chief engineer and project engineer for Ecsco Corporation on the Philadelphia job, testified that the rented warehouse in Philadelphia was used for the sub-assembly and storage of components on the Philadelphia job only and that no sub-assembly work done was done there for any other jobs and no materials were shipped to Philadelphia for use on these three new jobs [R. T. 736]. Stanick likewise admitted in his testimony that this procedure was never followed [R. T. 1396]. In fact, per the testimony of Mr. Leonard, the Philadelphia job was not even completed until November, 1961 [R. T. 749].

During the audit, however, appellant and Stanick represented to Dorr that as of August 31, 1960, Ecsco's portion of the Philadelphia job was completed, but that the sub-contractor "Gallagher" was doing installation work and had not completed his part of the contract which was the only remaining work to be done [R. T. 798]. At the completion of the audit, and before the same was prepared in final form, appellant and Stanick, on October 24, 1960, represented to Ernst & Ernst in a letter, Exhibit 15E [R. T. 829] as follows:

> "In connection with your examination of the financial statements of Universal Ecsco Corporation as of August 31, 1960, you have requested that we confirm to you certain representations implicit in the books of account and records kept by employees of the Company in the regular course of business . . . ." [Emphasis added]
>
> * * *
>
> "The company has adopted the policy of recognizing contracts profit on a completed contract basis. Administrative and general expenses are allocated to contracts on the basis of direct costs. At August 31, 1960, the total cost incurred on open jobs amounted to $544,609.73. Progress payments received on such jobs are reflected in the records as a liability. Due consideration has been given to estimated costs to complete these contracts.

It is our opinion that there are no loss contracts in progress at August 31, 1960. In addition to jobs completed during the period ended August 31, 1960, the following jobs were substantially complete at that date and accordingly were recorded as sales in the full amount of the applicable contract:

Customer	Total Contract	Sales Accrued	Estimated Cost to Complete
University of So. Calif.	41,659.00	4,165.90	1,262.25
Chevrolet 7/	228,938.00	228,938.00	11,829.04
M. C. Gill	19,123.40	770.40	- 0 -
Phila. Post Office	1,212.451.72	17,814.25	- 0 -

"Adequate provision has been made for additional costs to be incurred on completed contracts. The only work remaining on the Philadelphia Post Office job is covered by the A. A. Gallagher Warehousing Corporation sub-contract which has been recorded in full and, therefore, includes all costs to be incurred thereunder."

7/ The lengths of appellant's machinations to hide the true facts from the auditors extended not only to the Philadelphia job, but also to the Chevrolet matter; as, appellant in the latter part of August, 1961, instructed Kavert not to enter any more invoices in connection with the Chevrolet job and "to pull the purchase orders in connection with any job that would come in", as the Chevrolet job was then showing a loss [R. T. 461 and 462]. Kavert, pursuant to these instructions, held out $32,000 worth of invoices which are not reflected in this figure [R. T. 463].

8. THE COMPLETION OF THE SECOND AUDIT.

On the basis of the altered books and false explanations of appellant and Stanick, the Ernst & Ernst audit was concluded in late October, 1960, and copies of the audit report were submitted to the Lomasney firm [R. T. 158]. In spite of the alterations to Ecsco Corporation's books and the shifting of the costs of the Philadelphia job to the three new jobs (where under the completed contract method they were reflected as an asset in the category of Contracts in Process) the Financial Statement showed a loss of $26,994.00 for the four month period ending August 31, 1960 [R. T. 159]. Additionally, the report reflected inter alia that a retained earnings deficit of $26,994 existed and that the contracts in process totaled $544,600. The audit report prepared by Mr. Dorr, of Ernst & Ernst, reflected the figures set forth in Exhibit 1E (pp. 44, 45 & 46) [R. T. 37, 783] (See Appendix A). Following the receipt of the audit report, Mr. Wong, of the Lomasey firm, contacted appellant and Stanick and informed them that because of the loss shown by the audit, the Lomasney Company did not believe it could undertake the underwriting at that time for Ecsco Corporation [R. T. 160].

In desperation, Stanick traveled to New York to discuss the matter with Mr. Lomasney of the Lomasney Company. During a meeting between Stanick, Lomasney and Wong, Mr. Lomasney called Stanick a liar since appellant and Stanick had represented

that there was going to be a very substantial profit on the Philadelphia post office job, and the audit had not reflected any profit, but rather a loss of almost $27,000 [R. T. 163-164]. The Lomasney firm called off the underwriting for Ecsco Corporation; thereafter, Stanick was introduced to Mr. Shinn of Shinn Engineering, Inc. [R. T. 2001].

9. ECSCO CORPORATION COMBINES WITH SHINN ENGINEERING, INC.

At the same time Ecsco Corporation had been seeking an underwriting, a corporation known as Shinn Engineering, Inc. was also seeking public financing and had also engaged the firm of Myron A. Lomasney and Company in connection with a prospective underwriting [R. T. 1849]. The Lomasney firm concluded that it would be acceptable if Ecsco Corporation were combined with Shinn Engineering, Inc. and the underwriting be issued on behalf of these two companies [R. T. 1848-1849]. After various discussions between appellant, Stanick, principals of Shinn Engineering, Inc. (namely Clifford Shinn, the president), and the Lomasney Company, it was determined that the companies should merge and "go public" [R. T. 1849-1855]. Prior to the consummation of the merger, Clifford Shinn insisted that Ernst & Ernst be brought back to the premises of Ecsco Corporation to bring the financial statements up to date [R. T. 1862]. During discussions between appellant and Shinn, prior to the merger, Shinn inquired

of appellant where the inventory was for the three new jobs, which was reflected on the audit report as Contracts in Process as of August 31, 1960, in the amount of $542,610 (Exhibit 1E, p. 44) [R. T. 37]. Appellant informed Shinn that the inventory was located in various warehouses around the country [R. T. 2241-2242].

On November 14, 1960, Shinn Industries, Inc. was incorporated and acquired through an exchange of stock all of the outstanding capital stock of Shinn Engineering, Inc. and Ecsco Corporation (Exhibit 1E, p. 5) [R. T. 37]. Following the merger of the companies, appellant became Chairman of the Board of Shinn Industries, Inc. and Stanick became a Director and Executive Vice President. Clifford L. Shinn was a Director, as well as President (Exhibit 5, pp. 2, 3) [R. T. 37]. Appellant and Stanick continued to hold the offices in Universal Ecsco Corporation which they held prior to the merger.

10. THE FILING OF THE REGISTRATION STATEMENT AND AMENDMENTS WITH THE S.E.C.

On November 29, 1960, the combined company, Shinn Industries, Inc., filed a registration statement on Form S-1 under the Securities Act of 1933, as amended, with the United States Securities and Exchange Commission (Exhibit 1A) [R. T. 37]. Amendments to the registration statement were filed with the Securities and Exchange Commission on February 16, 1961

(Exhibit 1B) [R. T. 37] and March 27, 1961 (Exhibit 1C) [R. T. 37]. A Post-Effective Amendment was filed with the Commission on April 6, 1961 (Exhibit 1D)[R. T. 37].

Each of these filings with the S. E. C. included Ecsco Corporation's Statement of Financial Position and a Statement of Income and Retained Earnings Deficit for Universal Ecsco Corporation and Ecsco (a partnership), as set forth in Appendix A hereto. However, said financial statements filed in each of the registration statements did not include the penciled notations which are in fact the true figures that should have been reflected in these statements.

In December, 1960, after the registration statement was filed, but before the amendments thereto were filed, appellant requested Kavert to determine what the actual costs or true costs were on each of the new post office jobs, i. e., New Orleans, Houston, and Portland [R. T. 465, 466]. Kavert proceeded to go back to the books and determine the true costs on the new jobs and reported these facts to appellant each month from December, 1960, to May, 1961 [R. T. 466-469].

In June, 1961, after the stock had been offered to the public, Mr. Shinn noted that Universal Ecsco had consumed more cash than had been anticipated in cash flow projections. Shinn questioned appellant as to the reasons for the discrepancies and appellant's explanation was unsatisfactory to Mr. Shinn. [R. T. 1875-1880]. After an investigation Shinn accused appellant of cheating Shinn Industries and stated that Shinn Industries had not "received what

they had bargained for" [R. T. 1881]. Thereafter, Shinn requested Mr. Guy Wilson, who was in charge of the two previous audits, to return to Ecsco to determine whether the Contracts in Process figure was or was not correctly stated [R. T. 1886]. In August, 1961, Wilson conducted a reaudit [R. T. 1887]. Based upon the reaudit, Wilson concluded that the figures in the books had been altered prior to the second audit and that the amounts shown per Contracts in Process at August 31, 1960, were overstated by $372,137 and the amounts included in the registration statement as Contracts in Process in the amount $544,610 should in fact have been $172,473 [R. T. 930, 936]. See also Exhibit 16A, Mr. Wilson's work papers from the reaudit [R. T. 931]. Additionally, Mr. Wilson testified that the net loss for the year ended December 31, 1959 of Ecsco would be increased from $1,164, the amount reflected in the registration statement, to $130,604 (See Appendix A) [R. T. 949].

At the completion of Ernst & Ernst reaudit in August, 1961, and the establishment of the inventory deficiencies, and understatement of losses, appellant and Stanick were confronted by Shinn about the deficiency. Thereafter, they each executed a promissory note to Universal Ecsco in the amount of $186,068.60, which totals $372,137.20, the amount of inventory deficiency as determined by Ernst & Ernst, (Exhibit P) [R. T. 1898] in favor of

11. SUMMARY

The common stock of Shinn Industries, Inc. which was registered pursuant to the registration statement and amendments thereto was all sold to the public by May 1961. A Comparison of the losses of Universal Ecsco reported in the registration statement and amendments thereto and the actual losses incurred as proved at trial are set forth as follows:

	Year Ended 12-31-59	Four Months Ended 8-31-60	Seven Months Ended 11-30-60
Net Loss As Reported in Registration Statement	$ 1,169	$ 26,994	$171,655
Costs Applicable to Philadelphia Contract which were reported as costs incurred on New Orleans, Portland & Houston (contracts in process) 8-31-60 and 11-30-60		(372,137)	(372,137)
Shift of Costs applicable to Kansas City contract (year 1959) to Philadelphia contract (four months ended 8-31-60)	(134,513)	($134,513)	($134,513)
Net Loss for Respective Periods After Adjustments set forth above	($135,682)	($264,618)	($409,279)

V

ARGUMENT

A. INTRODUCTION

Appellant uses a scatter gun approach in enumerating his specifications of errors and alleges inter alia as error that the judgment is not supported by any substantial evidence, the judgment is contrary to the weight of the evidence and the judgment is contrary to law, pages 17 and 18 of Appellant's Brief.

The record of this trial, which continued over a period of six weeks, comprises in excess of 2,500 pages. Appellant has not made a proper formal statement of facts in this case, nor in the Statement of Facts has he indicated the references to the record wherein these facts allegedly appear. Appellee has given the facts in this case an exhaustive treatment.

Appellee questions whether this Court should even consider the allegation of insufficiency of evidence where the moving party has failed to state with particularity wherein and how the evidence was insufficient. It hardly seems to be the function of this Court to make a "quest for error" on its own initiative when the moving party fails to so state, and fails to indicate where the search should commence.

This Court, in passing upon Appellant's specifications of error, must view the evidence, together with all reasonable inferences in the light most favorable to the government. Noto v.

United States, 367 U.S. 290 (1961) and Byrne v. United States, 327 F.2d 825 (9th Cir. 1964). When the evidence is so viewed, it indicates a willful and deliberate attempt and effort on the part of Appellant and his co-defendant Stanick to knowingly and willfully cause the filing of false and misleading financial statements concerning the financial position of Universal Ecsco and its predecessor partnership Ecsco with the S.E.C. for the purpose of offering the securities of Shinn Industries, Inc. to the public as well as a classical case of conspiratorial conduct surrounding the filing and the filing of said Statements.

Incorporated herewith as Appendix B are the comments of the learned trial judge on the evidence which was presented at trial. While the remarks of Judge Hill were comments and not findings, these are included herewith for the reason that they are relevant and material and reflect the considerations of the trial court of the evidence in finding Appellant guilty as charged.

B. THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT OF ACTING IN CONCERT WITH STANICK AND OTHERS AND CONSPIRING TO OBSTRUCT THE LAWFUL FUNCTIONS OF THE S.E.C. BY FILING A REGISTRATION STATEMENT AND AMENDMENTS THERETO CONTAINING FALSE STATEMENTS ABOUT ECSCO AND UNIVERSAL ECSCO CORPORATION'S FINANCIAL CONDITION AS CHARGED IN COUNT 1 OF THE INDICTMENT.

That there are four essential elements required to be

proved in order to establish the offense of conspiracy. These elements are:

1. That the conspiracy alleged in the indictment was willfully formed and was existing at or about the time alleged;

2. That the accused willfully became a member of the conspiracy;

3. That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at the time and place alleged; and

4. That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

Ingram v. United States, 360 U.S. 672 (1959);

Brothers v. United States, 328 F. 2d 151 (9th Cir. 1964);

United States v. Falcone, 311 U.S. 205 (1940).

Appellee contends that the State of Facts, set forth, supra, conclusively demonstrates that all of these elements were proved by overwhelming evidence as under the general law of conspiracy, a common course of conduct between the defendants and/or third persons need not be based upon expressed agreement - tacit understanding is enough. Because the nature of a conspiracy is furtive and secret, neither the existence of the common scheme nor the fact that the defendants participated in it need be proved by direct evidence; both may be inferred from a development and collocation of circumstances.

Glasser v. United States, 315 U.S. 60 (1942);

Jefferson v. United States, 340 F. 2d 193
(9th Cir. 1965);
Daily v. United States, 282 F. 2d 818
(9th Cir. 1960).

Appellee submits that it has been proven more than a tacit understanding with regard to the conspiracy alleged. In late 1959, Appellant and Stanick realized they needed public finance and indeed sought it from various underwriters in New York City [R. T. 1493 and 1494]. In discussing the matter with Myron A. Lomasney and Company, Appellant had to use false financial statements indicating that Ecsco made a profit for the year ended December 31, 1959, when they, in fact, had a loss for that period in excess of $125,000 [R T. 126-130].

In fact, the entire agreement with Myron A. Lomasney and Company was based upon Ecsco's having a "profitable period" as represented by Appellant and Stanick [R. T. 155].

There can be no doubt that the fraudulent bookkeeping pattern began with the entry in December, 1959, the purpose of which was to shift approximately $125,000 of costs applicable to the Kansas City job, Ecsco's first complete major contract, to the Philadelphia job then in progress [R. T. 511-518]. The effect

of this shift was to understate losses for the year 1959 by $125,000, thus concealing substantial losses incurred by Ecsco during its first full year of operations [R. T. 948].

In order to properly conceal this loss from the underwriter, it had to first be concealed from the auditors which required the obtaining of false invoices and the credit memorandum from Condeco [R. T. 945-947]. Indeed, the underwriting scheduled to take place after the audit for the four-month period ended April 30, 1960, was postponed because, in fact, a loss was shown for that period in the amount of $25,715 [R. T. 146]. Appellant attempted to explain this loss to the underwriters as being due to the accounting methods of the auditors [R. T. 147-148]. Appellant and Stanick then promised Lomasney and Company as they had previously that the results of the August 30, 1960, audit would show a profit because the Philadelphia job would be complete. Appellant's motives and intentions became crystal clear when after seeing the loss reflected on the schedules prepared by Kavert on the Philadelphia job (Exhibits 14A and 14B), he informed Kavert that he could not sell a stock issue based upon the loss and then instructed Kavert to "allocate the costs in connection with the Philadelphia job to the new post office jobs" [R. T. 280]. When Mr. Dorr inquired as to the reason for sending materials for these three new jobs to Philadelphia, Appellant, Stanick and Kavert (pursuant to Appellant's instructions) replied that they were being sent to Philadelphia for sub-assembly [R. T. 457-458]. The entire scheme of Appellant and Stanick was

directed toward the sale of its stock to the public in order to obtain the very vital and necessary financing which it needed. It was based upon the altered books of Ecsco and upon the misrepresentations of Appellant, and Stanick, that the audit report for the period ended August 30, 1960, was prepared and included in the registration statements filed with the S. E. C. Certainly, the government proved more than a tacit understanding, and the proof was not only by circumstantial evidence, but also by very compelling direct evidence.

See Glasser v. United States, 315 U. S. 60, 80 (1942).

1. THE COMMISSION OF ALL OVERT ACTS ALLEGED WAS PROVEN.

Appellant alleges at page 22 of his Brief:

> "Sixteen separate overt acts are set forth in the indictment, and we strongly contend that none of these overt acts as alleged were proved by the government by any substantial evidence, or at all, or beyond a reasonable doubt to justify a conviction."

In the Argument that follows Appellant's contention, wherein he attempts to sustain his position, it must be noted that for the most part he relies on the testimony of Appellant, ignoring the plethora of evidence adduced by all the other witnesses, and when Appellant acknowledges other evidence, he attempts to refute

said evidence by the mere characterization of such testimony was "false and uncorroborated, evasive, inconsistent and incredible" (page 29, Appellant's Brief).

It is, of course, fundamental that overt acts which are alleged and proved need not themselves be a crime; the function merely is to show that the conspiracy is at work. Yates v. United States, 354 U.S. 298, 334 (1957). And, the government need not prove all the overt acts charged in the indictment; proof of one is sufficient. Robinson v. United States, 210 F.2d 29, 32 (D.C. Cir. 1954).

With regard to each of the overt acts, we will review them seriatim and briefly indicate the evidence which was introduced which conclusively demonstrates the commission, not only of the overt acts, but of the substantive offense charged.

a. Overt Act No. 1 charged that Appellant, Stanick and Kreiger on December 31, 1959, caused adjusting entries to be made in the books of account of Ecsco which reduced the net loss for 1959 in the amount of $125,770 [C.T. 6]. This act was proved through the testimony of Mr. Kavert, who testified that he was instructed by Mr. Kreiger early in the month of January, 1960, before the books of December, 1959, had been closed, to reverse $129,435 of costs out of the Kansas City job, thus reducing the expenses on that job [R.T. 514, 518]. See Exhibit 14H [R.T. 520].

b. Overt Act No. 2 charged that on or about April 1, 1960, Appellant and Stanick had a conversation in Los Angeles

with Quing Wong, a representative of Lomasney and Company, concerning the underwriting of securities of Universal Ecsco [C. T. 7]. This act was proven directly by the testimony of Mr. Wong who stated that he came to California in the first week of April, 1960, for the purpose of making an investigation of Universal Ecsco and that during the first week of April Wong had numerous discussions with Appellant and Stanick concerning the proposed underwriting [R. T. 131].

c. Overt Act Nos. 3 and 4. Overt Act No. 3 charged that on or about August 24, 1960, Appellant and Stanick had a conversation with Harold Kavert concerning shifting the loss incurred in the Philadelphia job to future post office jobs in order to facilitate the proposed sale of stock to the public. Overt Act No. 4 charged that Kavert at Appellant's instructions made alterations in the books of account of Universal Ecsco Corporation thereby reducing the loss on the Philadelphia post office job in the amount of $372,137 and increasing the assets by allocation of these jobs to contracts in progress [C. T. 7].

Harold Kavert, the head of Ecsco's accounting department, in August, 1960, unequivocally testified that in the latter part of August, 1960, Appellant requested him to prepare statements showing the costs for the Philadelphia job [R. T. 274]. Kavert prepared the statements (Exhibits 14A and 14B) which reflected a whopping loss on the Philadelphia job, and presented them to Appellant in Stanick's presence [R. T. 275, 278].

Kavert testified that when Appellant saw this statement he

"became quite upset" and informed Kavert that he (Appellant) could never sell a stock issue based on this statement. Appellant then instructed Kavert to reallocate the Philadelphia costs to the three new post office jobs [R. T. 280]. Appellant asserts "unequivocally" that Kavert's testimony "in essential areas was false and uncorroborated, evasive, inconsistent and incredible". The record establishes that Appellant's "assertions" in this regard are totally unsupported by the record. Kavert's testimony was corroborated by inter alia the following:

(a) The loss schedules prepared for the Philadelphia job on August 24, 1960, at Appellant's direction (Exhibit 14A and 14B). Appellant denied ever requesting Kavert to prepare these schedules and denied seeing them. Rhetorically, we pose this question: Why would the schedules have been prepared if it were not for the fact that someone had asked that it be done? It must be remembered that Appellant and Stanick were the sole stockholders and chief executive officers of Ecsco. Everything they had was at stake. Further, the underwriting which Appellant and Stanick were so desperately seeking required that a profit be shown per Appellant's representations [R. T. 155].

(b) The actual alteration of the books through the eradications of the column heading "Philadelphia" and the substitution of new column headings entitled "P. O. Others" in the books of original entry which books were produced at the trial and introduced into evidence as Exhibits 7A, 7B, 7D, 8A, 8B, 9A, 9B, 10A, 10B, 10C, 11A and 11B.

(c) The original ledger sheets and journal sheets which were removed because they could not be effectively altered from the books of Universal Ecsco Corporation and replaced by new sheets reflecting false data (Exhibits 7B, 7D and 9B).

(d) The fact that Mr. Dorr was told by Appellant and Stanick that sub-assembly work for the new jobs was being done in Philadelphia and that this was the reason the records reflected the shipment of materials for the new job to Philadelphia [R. T. 794].

(e) The statement by Appellant in response to Mr. Dorr's question why the company was not billing progress payments for materials that were sent back to Philadelphia for assembly and self-assembly work for these new jobs "that material costs could not be billed until such time as they were actually shipped from Philadelphia to the sites where the new jobs were going to be worked on." [R. T. 791-793].

(f) The representation by Appellant orally to Mr. Dorr that the only work remaining on the Philadelphia job was the work that had to be completed by the sub-contractor "Gallagher" and that Ecsco had completed their portion of what was required to be done [R. T. 832]. As well as, the written representations by Appellant and Stanick to this same effect, continued in Exhibit 15E.

d. Overt Act No. 5 charged that on October 24, 1960, the Appellant and Stanick caused a letter to be sent to Ernst &

Ernst confirming the fact that the Philadelphia post office job was substantially complete [C. T. 5]. This letter, containing false representations as noted supra, was introduced in evidence as Exhibit 15E [R. T. 829]. The letter is signed by Appellant as well as Stanick, and Appellant discussed it at length with Mr. Dorr prior to the time he executed it [R. T. 1795-1802].

e. Overt Act Nos. 6, 8 and 10 charge Appellant and Stanick with signing Amendment Nos. 1 and 2 and Post-effective Amendment No. 1, respectively, of the registration statements [C. T. 788]. Overt Act Nos. 7, 9 and 13 charge Appellant and Stanick with causing Amendment Nos. 1 and 2 and the Post-effective Amendment to be filed with the S. E. C. [C. T. 7-8]. Each of Overt Acts Nos. 6, 7, 8, 9, 10 and 13 is clearly proven by Exhibits 1A, 1B, 1C and 1D [R. T. 37] which are the registration statement and amendments thereto filed with the Securities and Exchange Commission on the dates indicated. Each such registration statement bears the signature of Appellant in his capacity as the Chairman of the Board of Shinn Industries, Inc. and President of Universal Ecsco. Clearly, there could be no clearer proof of the commission of these acts.

f. Overt Act Nos. 11, 12, 14, 15 and 16 charge Appellant and Stanick with causing confirmation of stock purchases to be sent to the various stock purchasers of Shinn Industries, Inc. stock in New York and California. Of course, it was the proceeds from the sale of the securities which Appellant was so desperately seeking. In connection with the sale of stock to the public by a

broker-dealer such as Lomasney and Company, the broker-dealer is required to send to the purchasers a confirmation of purchase (Rule 15c1-4, Confirmation of Transactions of the General Rules and Regulations under the Securities Exchange Act of 1934, as amended). 17 C. F. R. 240. 15c1-4. That Appellant must bear the consequences of these mailings is clear since if in the offer and sale of securities one does an act with knowledge that the use of the mails will follow in the ordinary course of business or such use is reasonably foreseeable, the parties to the scheme are chargeable with the mailings.

Danser v. United States, 281 F.2d 492, 496 (1st Cir. 1960).

It was stipulated at trial that each of the individuals who were named in Overt Act Nos. 12 through 16, inclusive, as having received a confirmation of sale, did in fact make a purchase of Shinn Industries stock in April or May, 1961, from Myron A. Lomasney and Company. Pretrial Stipulation, Exhibit 5, pp. 6-7 [R. T. 35]. The actual confirmation received by Mr. Carl Davis (Overt Act No. 12), Mr. Livio Pinterpe (Overt Act No. 14) and Mr. Wilson H. Miller (Overt Act No. 15) was received in evidence pursuant to said Stipulation as Exhibits 2A, 2B and 2C, respectively [R. T. 41, 43]. And, it was stipulated in said Exhibit 5 that Mr. William (Overt Act No. 16) did, in fact, received a confirmation of the purchase of his shares.

In the instant case when the government proved not only one of the overt acts alleged, but all 16 beyond any and all

reasonable doubt.

C. THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT OF KNOWINGLY AND WILLFULLY CAUSING FALSE STATEMENTS OF MATERIAL FACTS TO BE MADE IN THE AMENDMENTS TO THE REGISTRATION STATEMENT AS CHARGED IN COUNTS TWO, THREE AND FOUR OF THE INDICTMENT.

Each of the substantive offenses (Counts 2, 3 and 4) charge that the false statements Appellant caused to be made were made in each of the amendments to the registration statement and related to the financial condition of Universal Ecsco Corporation and its predecessor partnership, Ecsco. With regard to Ecsco, the false statement was contained in the Statement of Income in the registration statements and stated that the net loss of Ecsco for the year ended December 31, 1959, was $1,169 when in fact it was in excess of $125,000.

With regard to the false statements concerning Universal Ecsco Corporation, the false statements were:

(a) In the Statement of Financial Position, the contracts in process for the four-month period ended August 31, 1960, were $554,610 when, in fact, these contracts in process were less than $175,000.

(b) In the Statement of Income, the net loss of Universal Ecsco Corporation for the four-month period ended August 31, 1960, was stated as $26,994 when, in fact, the net loss

for this period exceeded $395,000.

(c) In the Statement of Financial Position, the retained earnings deficit of Universal Ecsco Corporation as of August 31, 1960, was represented as $28,944 when, in fact, the deficit exceeded $395,000.

The facts set forth in Appellee's Argument relating to the conspiracy charge, Count 1 of the indictment, are appropos to and demonstrate Appellant's guilt of the substantive counts as well and, that the acts of Appellant in connection with the preparation and filing of the false statements were knowingly and willfully done, i.e., voluntarily and intentionally. United States v. A&P Trucking Company, 358 U.S. 121 (1958); Morissette v. United States, 342 U.S. 246, 250, 252, 264 (1952).

The case of United States v. Danser, 26 F.R.D. 580 (1959), aff'd, 281 F.2d 492 (1st Cir. 1960), which Appellant cites in his brief (p. 58), does not lay down any principle of law that is inapposite to the rulings and findings of the trial court in this case. While the facts of the case are not discussed in the court's opinion (it is a reproduction of the court's charge to the jury), the offenses charged in Danser related to §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), and not §77x, Title 15, U.S.C., as do Counts 2, 3 and 4 of the present indictment. In Danser the court charged the jury:

> "The Government must show that Danser actually knew that the particular statement in question was false. This does not mean that the Government

has to offer the testimony of some witness who told Danser that the particular statement was false, or to offer the testimony of some witness who heard Danser say that the particular statement was false. The Government may rely upon circumstantial evidence. That is, the Government has a right to present evidence on topics such as how the executives of the company reported to Danser, what types of oral and written reports were made to Danser, what interest Danser took in financial details, and what significance particular matters had in connection with Danser's role in the enterprise as a whole . . . ." [Emphasis added]

* * *

"I instruct you as a matter of law that if before a person makes a technical financial statement . . . [a] he in good faith selects a competent accountant or lawyer, and (b) he places all the relevant facts known to him before that competent expert, and (c) he receives from that expert an opinion as to how these facts may fairly be stated, and (d) he believes that expert opinion was rendered in good faith and (e) in reasonable reliance upon that expert opinion he uses a form of statement which corresponds with the expert opinion, you cannot find that the person who so relied had

knowledge that the statement was false or intended to defraud." (pp. 586-587).

Certainly in the case at bar Appellee has met the requirements as set forth in Danser as demonstrated in the Statement of Facts set forth herein, supra. Accordingly, Appellant's reliance upon this case is woefully misplaced.

D. THE TRIAL COURT DID NOT COMMIT ERROR IN ITS RULINGS RE JENCKS ACT STATEMENTS.

Appellant contends that the trial court "erroneously ruled" in connection with the enforcement of a stipulation concerning the Government's failure to submit Jencks Act statements within 48 hours prior to the testimony of three of the Government's eleven witnesses (Appellant's Brief pp. 50-52). The allegation is made with reference to testimony of Government witnesses Myron A. Lomasney, Rodgers Dorr, and rebuttal witness Clifford Shinn. These Jencks Act Statements were the testimony taken by the S. E. C. in its private investigation. Appellant does not contend that the statements were not furnished him prior to his cross-examination, since he was in fact, furnished them, but rather "that the defense was placed at a disadvantage and was unduly handicapped in having [sic] an opportunity to more carefully study and evaluate the prior testimony." (Appellant's Brief p. 52).

At the outset it must be noted that 18 U. S. C. 3500 requires

the following:

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

The facts surrounding the Jencks Act statements for these witnesses are as follows:

(a) With regard to Myron Lomasney, the Government's first witness, on the first day of trial (June 27, 1966) Appellant, through his counsel, complained to the Court that he had just received a volume of testimony relating to testimony of Mr. Myron Lomasney before the Securities and Exchange Commission [R. T. 23]. Mr. Maidman stated [R. T. 24]:

> ". . . but it is my understanding that Mr. Mattison also made a call, and was told that he is welcome to come down to the office of the United States Attorney and see the statements; that his interpretation, as he understood it, was that they were making them available to let him see them and take extracts therefrom. And he was also requested to convey this information to me.
>
> "Now I heard this comment."

When the Court requested to hear from the Government it was informed by Government counsel that: (1) counsel did indeed

make the statements available to the various defense counsel and (2) Mr. Mattison, counsel for defendant Stanick, informed Mr. Maidman of the fact the transcripts would be available in the U. S. Attorney's office (as the Government did not wish to let the statements be taken out of its possession) and (3) Mr. Mattison visited the U. S. Attorney's office on Saturday afternoon, June 25, 1966, for the purpose of reviewing S. E. C. transcripts, including Mr. Lomasney's [R. T. 25, 26]. Government counsel then informed the Court:

> "Your Honor, it has been called to my attention, through the United States Attorney's Bulletin, which is a publication issued from the Attorney General's office, that all materials that the Government supplies as Jencks Act [materials] . . . must be returned to the Government for the obvious reason that we don't want it to be used later as a part of any private proceeding or litigation.
>
> "Now, we will be more than happy to make these available at all house in our office. We were in the office for 12 hours Saturday and 14 hours yesterday [Sunday]. We will continue to be available on almost an around-the-clock basis in the United States Attorney's office." [R. T. 26, 27].

During the course of this discussion the Court pointed out to Appellant's counsel that it was late in the morning and that the Court had many sentences on its afternoon calendar. Therefore,

Appellant's counsel would have from the noon recess and thereafter for the reading of Mr. Lomasney's statement [R. T. 26]. In the afternoon of Monday, June 27, 1966, Mr. Lomasney was called as the Government's first witness and cross-examination of Mr. Lomasney started that same afternoon by Appellant's counsel [R. T. 86]. Thereafter, in lieu of calling Mr. Lomasney back to testify on June 28, 1966, all parties stipulated that certain questions propounded to Mr. Lomasney at a hearing before the Securities and Exchange Commission on August 16, 1962, and Mr. Lomasney's answers to those questions, may be read into the record in lieu of Mr. Lomasney's being required to come back to testify [R. T. 93]. Defendant's counsel then proceeded to read into the record almost all of the transcript of S. E. C. proceedings given by Mr. Lomasney [R. T. 96-109].

(b) With regard to Rodgers Dorr's Jencks Act statement, the S. E. C. transcript was mailed to Mr. Mattison, counsel for Stanick, on Friday, July 1, 1966, addressed to Mr. Mattison at his office. Mr. Mattison had previously informed Government counsel that he would be working the 2nd, 3rd and 4th of July at his office with the expectation that it would be passed on to Appellant's counsel, Mr. Maidman [R. T. 754].

On July 6, 1966, at approximately 3:00 o'clock p. m., Rodgers Dorr was called as a witness and testified in behalf of the Government. Mr. Dorr's testimony continued on direct examination until approximately 11:00 o'clock a. m., July 7, 1966 [C. T. 70], when cross-examination commenced [R. T. 836].

During the cross-examination of witness Dorr, Appellant read into the record purported "impeachment" 8/ [R. T. 893-897]. At the conclusion of Mr. Dorr's redirect examination (the afternoon of July 7), Mr. Dorr was excused and Appellant raised no objection or made any statement whatsoever about not having had sufficient opportunity to read the transcript [R. T. 907]. On August 2, 1966, Mr. Dorr was recalled to testify in rebuttal and cross-examined by Appellant's counsel [R. T. 2321-2330]. At no time was any objection or protest to the Court made by Appellant that he had not had sufficient time in which to study the S. E. C. transcript of Mr. Dorr's testimony.

(c) With regard to Clifford L. Shinn, on Tuesday, August 2, 1966, during the defendants' presentation of their case, the Government was required to call Mr. Shinn (who was a rebuttal witness) our of order since two defense witnesses who were expected were not then available [R. T. 2237]. Appellant's counsel had been given Mr. Shinn's testimony, S. E. C. transcripts, that morning [R. T. 2239]. Mr. Shinn's testimony as a witness was limited by the Government to two very narrow and specific areas. The first area of questioning related to whether or not Appellant had ever told Mr. Shin that the inventory for the new jobs, i. e., New Orleans, Houston and Portland, was located at warehouses throughout the country [R. T. 2239, 2240]. The second related to a conversation which defendant Stanick had with Mr. Shinn

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8/ A comparison of Mr. Dorr's S. E. C. testimony (read into the record) with his testimony at trial is entirely consistent.

following the discovery of the false financial statements by Mr. Shinn [R. T. 2243]. Mr. Shinn was called strictly as a rebuttal witness to testify as to statements made by Appellant wherein Appellant at the trial denied making such previous statements. Following this very brief testimony on direct, Mr. Shinn was questioned at length by counsel for Appellant as well as counsel for defendant Stanick [R. T. 2250-2285]. Counsel for both Stanick and Appellant informed the Court at approximately 12:00 o'clock noon that they had no further questions of Mr. Shinn. Government counsel then stated to the Court who was about to excuse the witness and adjourn for the noon recess:

> "I would like to point out before we excuse this witness that in view of Mr. Maidman's statements concerning the so-called Jencks Act statement, the Government will ask this witness to remain or at least to return at 2:00 o'clock, if that is convenient with the Court, or 1:45, in the event that there are any questions that defense counsel wish to put to the witness if that meets with the Court's concurrence.
>
> "THE COURT: Very well . . . we will ask him to be back here at 1:45." [R. T. 2286].

Earlier, Government counsel had pointed out to the Court and Appellant's counsel, as well as Stanick's counsel, that the testimony that Mr. Shinn gave was covered in approximately eleven pages of testimony in the S. E. C. transcript [R. T. 2266].

Government counsel then outlined the pages as to where the testimony could be found in each of the transcripts that was covered on direct [R. T. 2266].

Following the noon recess, counsel for defendant Stanick moved to reopen cross-examination [R. T. 2228], and proceeded to read into the record approximately eleven pages of testimony which Mr. Shinn gave before the S. E. C. [R. T. 2290-2304]. At this time counsel for Appellant also moved to reopen cross-examination of Mr. Shinn for the purpose of reading a portion of Mr. Shinn's deposition into the record [R. T. 2304-2306]. Following this reopening of cross-examination and the conclusion of Appellant's questions to Mr. Shinn, the Court inquired of counsel:

"THE COURT: . . . may he [Mr. Shinn] be excused? Is that agreeable, gentlemen?

"MR. MAIDMAN: Yes, your Honor.

"MR. MATTISON: Yes, your Honor."

and thereupon the witness was excused [R. T. 2307].

Although final argument in the case did not begin until the morning of the following day, August 3, 1966, at no time did counsel for Appellant object to or request the opportunity for additional time to cross-examine the witness Shinn regarding the S. E. C. transcripts.

It is submitted that Appellant's allegations in regard to the so-called Jencks Act statements have not, nor could he, demonstrate that he has suffered any harm. Indeed, it is even questionable what it is that Appellant contends:

"We contend that this afforded opportunity was inconsistent with affording defendant a fair trial and particularly did violence to the Court's own order." [Appellee's Brief, p. 51].

A witness may be recalled or a matter may be reopened for the reason that he did not have sufficient opportunity to properly cross-examine the witness on the grounds that he did not receive the "Jancks Act materials timely". Appellant has not demonstrated that he was denied due process of law or, even an inference of prejudice regarding the "untimely presentation of Jencks Act materials". cf. Worldwide Automatic Archery, Inc. v. United States, 356 F.2d 834 (9th Cir. 1966). Nor is there any allegation, and in fact there could be none, that the Government has not complied with the Jencks Act as stated in 18 U.S.C. §3500. Clearly, in view of the extended cross-examination and reading into the record the provisions of the various witnesses' testimony as part of Appellant's cross-examination and expressly consenting to the excusal of all witnesses and not requesting to recall the witness, no error was committed. If in fact the Court concludes it was error under the circumstances of this case, it must conclude that it was harmless error pursuant to Rule 52, Federal Rules of Criminal Procedure. See Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965), cert. denied, 384 U.S. 921; United States v. Monjar, 147 F.2d 916 (3rd Cir. 1945, cert. denied, 65 S. Ct. 1191.

E. THE TRIAL COURT DID NOT COMMIT ERROR IN ITS RULING RE GRAND JURY TESTIMONY.

Appellant makes much of the fact that the testimony of one Grover Kreiger, one of the witnesses who appeared before the grand jury in connection with its investigation of this case, was not produced. It must be noted that Mr. Kreiger was never called as a witness either by the defendants or the Government during the trial of this case. Therefore, the Appellant's contention that the case of United States v. Youngblood, 379 F. 2d 365 (2nd Cir. 1967) supports this allegation of "error" is completely unfounded. In Youngblood, the Second Circuit, in enunciating a prospective rule regarding production of transcripts of grand jury proceedings stated at page 370:

> " . . . we direct that at trials commencing after our judgment here is entered, the District Courts of this circuit at the request of the defendant should order that the defendant be allowed to examine the grand jury testimony of those witnesses who testify at his trial without requiring him to show any particularized need for this material; we are holding that a defendant should be entitled to see all the grand jury testimony of each witness on the subjects about which that witness testified at the defendant's trial." [Emphasis added].

Furthermore, at the time Appellant made a "request" (at a pre-trial conference) for Mr. Kreiger's grand jury testimony, the court informed Appellant and his co-defendant that in view of the Government's opposition, counsel would have to "make a motion and accompany said motion with an affidavit". Although Appellant's counsel said he would make such a motion, none was ever made [R. T. Vol. A 138, 139, 140].

F. APPELLANT'S ALLEGATIONS RE "THE COURT'S SPEEDING UP THE TRIAL."

Appellant contends that one of the factors the defense had to contend with during the trial was "the constant admonition of the trial judge, both directly and indirectly, to speed up the trial," and that this "was of great disadvantage to the defense." [Appellant's Brief pp. 55-56]. However, Appellant fails to show in any way the judge's remarks, the context in which they were made or why the rulings were error, much less prejudicial error requiring reversal. Appellant cites no cases to support his contentions. He merely makes reference to 13 places in the record, without further comment, which he requested that the court examine. Clearly, Appellant has failed to sustain his burden of demonstrating any error, let alone prejudicial error. Lake v. United States, 302 F. 2d 452, 456 (8th Cir. 1962); Butler v. United States, 310 F. 2d 214, 219 (9th Cir. 1962).

Even after examination of the references that Appellant points out, it is clear that there was no error in the proceedings and that Appellant's contentions are utterly without merit. The conduct of a trial is always a matter within the discretion of the trial judge, and no abuse of discretion is shown here. Roseman v. United States, 354 F. 2d 18 (9th Cir. 1966).

It is well settled that when the record is examined for incidents of this alleged character, "questions and comments of the court must be read in their context and viewed with a

perspective of the whole proceedings." Ochoa v. United States, 167 F. 2d 341, 344 (9th Cir. 1948). Taking Appellant's references in the order that he lists them [Appellant's Brief p. 56], examination of the record discloses the following:

1. "R. T. 629, lines 1 and 2." Judge Hill made the remark: "We have just got to move this trial a little, gentlemen." Appellant fails to show or explain how this remark was in any way prejudicial to the substantive rights of Appellant, or was an abuse of discretion on the part of the trial judge. It is clear from the record that the remark was given for the benefit of all counsel involved in the trial, not directed to the defense, and was prompted by the fact that Mr. Maidman himself, counsel for Appellant, had delayed the process of the trial considerably by repeated efforts during his cross-examination to ask questions beyond the scope of direct examination [R. T. 577 through 579, 617, 618, 627, 628].

2. "R. T. 657, lines 17-25." At this point in the proceedings Mr. Maidman was continuing cross-examination of a Government witness. Appellee is unable to ascertain what incident took place here that could possibly have affected the substantial rights of Appellant, or that indicate an abuse of discretion on the part of the trial judge. Judge Hill said, "All right. Let's proceed gentlemen." [R. T. 657]. Surely Appellant is not claiming that this comment placed him at any disadvantage whatsoever. At this time Mr. Maidman had been reading into the record some questions and answers from a deposition in a civil case of Mr. Kavert. Judge Hill made a suggestion to Mr. Maidman, stating: "You know, you

could help us a great deal if you could give us everything in one document before you went to another document." Mr. Maidman answered: "I just had this down under a separate subject matter, your Honor." Judge Hill then stated: "All right." Again, Appellee cannot see what possible prejudice this remark had on the rights of Appellant.

3. "R. T. 659, line 6 through 661, line 5." At this point the court inquired of Mr. Maidman how many more books and extracts would be read into the record, since it was near the time for adjournment. Then the court announced that the evening adjournment would be taken and made a suggestion to all counsel that they try harder to organize their direct and cross-examination to keep on one subject matter at a time. At R. T. 661, lines 2-5, Judge Hill stated:

> "But let the record be clear that I am not inhibiting your cross-examination in any respect. I am only pleading with you to organize your work for the maximum result of the time we have at our disposal."

There is nothing in these remarks that indicates the slightest evidence of any abuse of the trial court's wide discretion in conducting the trial.

4. "R. T. 725, line 15 through 726, line 4." At this point Mr. Maidman was conducting recross-examination of Government witness Kavert. There had been some procedural problems [R. T. 723, lines 3-10] involving recross-examination by both

counsel for the two defendants, and Judge Hill adopted a procedure whereby all cross-examination must be finished before redirect examination started. No objection was made to this ruling, and it is clearly within the judge's discretion to adopt methods of procedure which would help simplify the conduct of a trial.

5. "R. T. 740, lines 12-23." At this point Mr. Mattison, counsel for defendant Stanick, had completed cross-examination of a Government witness. The time was 12:00 noon. For his cross-examination, Mr. Maidman stated that he had "one question, your Honor or several. . . . It won't take more than five minutes." The court wanted to know precisely whether Mr. Maidman had one or several questions; if several, then the court would adjourn for the noontime recess. Mr. Maidman asked the judge for five minutes for cross-examination, whereupon the judge declared the noon recess. Appellee submits that there was no abuse of discretion on the part of the trial judge in calling a recess at 12:00 noon, the normal time for the noon recess, especially after a logical break in the proceedings, i. e., Mr. Mattison had finished his cross-examination. Appellee fails to understand how the granting of the noon recess at this time has any bearing on Appellant's contention that the judge speeded up the trial to the disadvantage of Appellant.

6. "R. T. 842, lines 15-19." At this point Mr. Maidman was cross-examining a Government witness. In reference to this cross-examination the court asked Mr. Maidman: "Are you proposing to take him through every day and every hour of the time he was there?" Appellee submits that it was within the court's discre-

tion in conducting this trial to ask such a question in order to prevent the possibility of totally irrelevant testimony being interjected into the record with the attendant delay in reaching the real issues of the case. In any event Mr. Maidman answered the question of the judge by stating, "No, your Honor." Mr. Maidman was then permitted to continue with his cross-examination [R. T. 842].

7. "R. T. 850, line 20 through 851, line 15." At this point Judge Hill commented that he was concerned with the amount of time the case was taking and advised Mr. Maidman, who had been cross-examining Government witness Dorr (one of the accountants with Ernst & Ernst), that

> "I would certainly hope, Mr. Maidman, that we are not attempting to try the firm of Ernst & Ernst for any alleged negligence. That is not an issue before me, it seems to me. And if they were in some way at fault, that is not before me, as it would not excuse defendants' guilt, if they were guilty.
>
> "So I would hope that you would agree with that analysis --
>
> "MR. MAIDMAN: I do.
>
> "THE COURT: -- and bear in mind that we are not here attempting to try any possible civil liability or other culpability of Ernst & Ernst; and hold the scope of questioning to the real issues of the case, . . .
>
> "MR. MAIDMAN: I will try to keep that in mind, your Honor."

"THE COURT: Very well. We will see you after recess.

"Ten minutes."

It is apparent that Mr. Maidman's cross-examination of Dorr was running far afield from the real issues in the case. Again Judge Hill was exercising his discretion in trying to keep the scope of the testimony away from obviously irrelevant issues. There was no intimidation on the part of the trial judge here or at any other point during this trial, and Mr. Maidman properly agreed with the court's analysis that this subject was irrelevant to the real issues of the case. See United States v. Danser, 26 F. R. D. 580, 586 (1959).

8. "R. T. 969, line 8 through 970, line 10." At this point, at the close of the afternoon session (when the Government indicated it would be resting its case shortly), the court indicated that it would be required to adjourn on the following day at 3:00 o'clock due to other matters on its calendar. The following comments were made by counsel for the co-defendant, Mr. Mattison:

"MR. MATTISON: Your Honor, I wonder whether it would be appropriate at this time to discuss the question of speeding up this trial? It's been lengthy, and will be lengthy. I wonder whether this would be an appropriate time to discuss it, if I may, briefly.

"THE COURT: I don't know what you have in mind. I like the sound of your objective.

"MR. MATTISON: I understand there will be no court the week of [July] 11th.

"THE COURT: That is the Ninth Circuit Judicial Conference.

"MR. MATTISON: When we reconvene again would it be possible for us to go an extra hour or so a day?

"THE COURT: Well, we shall see. I don't want to make any promises. I would hope that in that week you will have had a chance to carefully re-evaluate the Government's case and tailor your case to it, and to the substantial issues that may have been raised by you.

"MR. MAIDMAN: I assure you I shall do that, your Honor.

"THE COURT: It's unusual to have a week in which to consider the presentation of the defense case.

"I would also hope that there are matters that are susceptible of further stipulations between you and Government counsel. But that is entirely up to you.

"I am unable to comment much beyound that. I am anxious, after the week of the Judicial Conference, to move the case as much as can be done, within reasonable time limits. I have other cases on my calendar now that will start to pile up, if we do not end it within a reasonable time after we resume.

"So I am with you. Although I don't want to make any iron-clad promises of the length of time

that we will be working. I will appreciate anything you all can do to expedite the matter.

"Very well. We will see you in the morning. 9:45."

It is incomprehensible how Appellant can cite this as an example of the court "speeding up the trial."

9. "R. T. 1030, lines 12-18." At this point Mr. Maidman indicated that he wanted to make a motion to strike. The court asked him if it would take him any time to do this. Mr. Maidman replied, "no," that it would only take him about two minutes. The court replied, "All right." And Mr. Maidman made the motion.

10. "R. T. 1264, lines 6-8." At this point the court asked if defendants had come to any different conclusion about the length of their case, because, "I am trying to arrange my calendar." Clearly there is nothing in this statement that in any way places the Appellant at any disadvantage or is indicative of any intention to speed up the trial.

11. "R. T. 1831, lines 2-12." At this point the court inquired of Mr. Maidman as to how long it would take him to finish the direct examination of a witness. The court stated: "Well, I am just trying to do some planning. I have lawyers continually bombarding us for future trial dates."

12. "R. T. 2111, lines 5-8." At this point Mr. Maidman indicated to the court that he had three character witnesses on behalf of Appellant, "whom we would like to take out of order." Whereupon the court asked, "They will be brief, I take it?"

13. "R. T. 2287, lines 10-13." At this point the court remarked to Government counsel:

> "Mr. Smaltz, I am somewhat disturbed at your announcement to me this morning that we had five more rebuttal witnesses. I surely hope that you are not piling things on cumulatively. This case has to end sometime."

How this statement can ever be characterized as directing the Appellant to "speed up his case" is beyond rational comprehension. The comment was directed to Government counsel and not Appellant. At no time during the trial did counsel for Appellant ever complain that he was being unduly hurried by the court. In fact, the co-defendant's counsel specifically indicated he wanted to move the case along more rapidly. Appellant has not demonstrated even a scintilla of fact in support of his contention and the 13 alleged indiscretions on the part of the trial court in the course of a non-jury trial that consumed over 2,500 pages of transcript. Considered individually, or in toto, there was no abuse on the part of the trial court in its discretion in conducting the proceedings. Butler v. United States, 310 F. 2d 214, 217 (9th Cir. 1962). Rather, after a careful reading of the entire transcript it can only be concluded that the trial was conducted by a very learned judge who continually demonstrated that he was a pillar of patience and afforded defense counsel every indulgence possible.

G. THE TRIAL COURT DID NOT ERR IN ITS RULINGS ON OBJECTIONS ADVERSE TO THE DEFENSE.

Appellant complains in his brief (p. 56),". . . the court erred on its rulings on objections adverse to the defense, we refrain from comment or argument in each item. We submit that the error of each ruling was harmful to defendant."

Following this, Appellant then cites no less than seventeen references to the transcript where either the Government made an objection which was sustained, or Appellant's counsel, or the co-defendant's counsel made an objection which was overruled. No legal authorities are cited in support of Appellant's allegations that said rulings were "harmful to the defense" i. e., error, nor does Appellant explain how or why said rulings were harmful, neither in his brief, nor in the cited portion of the record of trial. In Lake v. United States, 302 F. 2d 452 (8th Cir. 1962), the court stated with regard to this method of raising alleged error (at p. 456):

> ". . . Appellant does not undertake to demonstrate any prejudice thereby other than to refer to such rulings en gross in his brief, without further comment. . . . Appellant has not demonstrated prejudicial error in respect to any of the foregoing matter. He has failed to sustain the burden cast upon him in that regard. (Myres v. United States, 174 F. 2d 329 (8th Cir. 1949).)"

Under the circumstances of this case it can hardly be seriously contended that Appellee should reply to, or that the court should consider, issues which have neither been raised nor defined and which have no support in the record of trial. Cf. Butler v. United States, 310 F. 2d 214, 219 (9th Cir. 1962).

H. "ALLEGED RESTRICTION ON CROSS-EXAMINATION."

Appellant argues that he was unduly restricted on his right to cross-examine certain witnesses and points to his efforts to examine Mr. Robert Follett regarding Mr. Clifford Shinn's (a Government witness) "lack of respect as to the taking of an oath and his atheistic leanings."

Appellant alleges:

> "With this restriction it was impossible to go forward with the defense effort to prove that all of Shinn's 'sworn' testimony before the court . . . was a complete fabrication and inherently false."
> [Appellant's Brief p. 54].

The precise questions which Appellant asked of Mr. Robert Follet, a defense witness, on direct examination, and the objections thereto, were as follows:

BY MR. MAIDMAN:

> "Q May I ask you this: Have you ever been present during any times that Mr. Shinn referred to

other court proceedings in which he had taken an oath?

"A Yes, I have.

"MR. SMALTZ: Your Honor, I submit that we have not transcended the bounds --

"THE COURT: Yes. We are not getting reputation now. And if you want to impeach Shinn in connection with his question about atheism, you should have laid a foundation.

"MR. MAIDMAN: Your Honor, I don't intend to do that.

"THE COURT: The objection is sustained."

BY MR. MAIDMAN:

"Q Have you ever had any direct discussions with Mr. Shinn about his telling the truth or telling falsehoods in court proceedings?

"MR. SMALTZ: Your Honor, I submit that this is not proper.

"THE COURT: Sustained. If there is to be such, you should have laid a foundation with Shinn.

"Any further questions?

"MR. MAIDMAN: If I may be heard on this very briefly, your Honor --

"THE COURT: No, sir. You may proceed.

"MR. MAIDMAN: Nothing further." [R. T. 2319, 2320].

During Mr. Shinn's previous cross-examination he had

been asked only one question about his alleged "atheistic beliefs," which was:

BY MR. MATTISON:

"Q Are you an atheist, sir?

"A No, I am not.

"Q You are not?

"A No. [R. T. 2289].

From the above it is clear that no proper foundation -- in fact, no foundation whatsoever -- was laid with regard to Appellant's asking Mr. Follett these questions.

The law is settled that a sufficient foundation for prior inconsistent statements includes calling the attention of the witness being impeached to specific statements, so as to give an opportunity for explaining any inconsistency. In Burton v. United States, 175 F. 2d 960, 965 (5th Cir. 1949), reh. denied, 176 F. 2d 865, cert. denied, 338 U. S. 909, the court said:

> "It is a well settled principle that a witness may not be discredited or his hostility and bias shown by proving statements made by him outside the court which do not harmonize with his statements on the witness stand, until his attention has been called specifically to the former statements, with particularity as to time, place and circumstance, so he can deny or explain them."

Cf. The Charles Morgan, 115 U. S. 69 (1884). Further, the scope allowed for this kind of examination, and the sufficiency of the

foundation, are largely matters of discretion with the trial court. As the court said in Samish v. United States, 223 F. 2d 358, 364 (9th Cir. 1955), cert. denied, 350 U. S. 848:

> "A trial judge in determining the sufficiency of a foundation necessarily must be permitted considerable latitude. (Citations)"

Accordingly, the court properly sustained Government counsel's objection and said rulings were not error.

VI

CONCLUSION

Although the trial was lengthy and the exhibits voluminous (there being in excess of 500), the record absolutely refutes Appellant's allegations concerning the erroneous rulings and misconduct of the trial judge. Rather, a careful review of the record establishes that this case was presided over by a very learned trial judge whose efforts at sifting and understanding the evidence were indefatigable. Throughout the entire trial the court's patience did not wane nor were any of its rulings in error. The evidence clearly established beyond a reasonable doubt Appellant's guilt

and for the reasons stated herein, it is respectfully submitted that the judgment and sentence of the court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

DONALD C. SMALTZ,
Special Assistant to the
United States Attorney,
Central District,

Attorneys for Appellee,
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Donald C. Smaltz

DONALD C. SMALTZ
Special Assistant to the
United States Attorney,
Central District

OPINION OF INDEPENDENT ACCOUNTANTS

Board of Directors
UNIVERSAL ECSCO CORPORATION
Downey, California

We have examined the statement of financial position of Universal Ecsco Corporation at August 31, 1960, its statement of income and retained-earnings deficit for the period of four months then ended, and the statement of income of its predecessor partnership for the period from April 14, 1958 (inception), to April 30, 1960. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, subject to the outcome of the claims referred to in Note R to financial statements, the accompanying statement of financial position and statements of income and retained-earnings deficit present fairly the financial position of Universal Ecsco Corporation at August 31, 1960, and the results of operations of the Company and its predecessor partnership for the period from April 14, 1958, to August 31, 1960, and the summary of earnings (included elsewhere in this Prospectus) for the same period presents fairly the information therein, in conformity with generally accepted accounting principles applied on a consistent basis.

ERNST & ERNST

Los Angeles, California
October 24, 1960.

APPENDIX A

UNIVERSAL ESCO CORPORATION

STATEMENT OF FINANCIAL POSITION

ASSETS

	August 31, 1960	November 30, 1960 (Unaudited)
CURRENT ASSETS		
Cash	$ 7,933	$ 16,247
Amounts due on completed contracts	265,033	75,307
Due from factor upon realization of accounts (August 31, 1960—$203,563; November 30, 1960—$53,815) assigned to it	40,712	15,333
Due from subcontractor—Note S	172,473	213,984
Contracts in process—Note M	~~544,610~~	~~649,372~~ 277,235
Less progress payments received	22,559	46,525
	$ 522,051	$ 602,847
Prepaid expenses	9,452	8,768
TOTAL CURRENT ASSETS	$ 845,181	$ 932,486
OTHER ASSETS		
Due from officers (shareholders)	$ 4,737	$ 7,248
Sundry deposits, advances, etc.	4,836	3,923
TOTAL OTHER ASSETS	$ 9,573	$ 11,171
PROPERTY, PLANT, AND EQUIPMENT—on the basis of cost—Note N		
Building and improvements	$ 39,325	$ 39,325
Machinery and other equipment	136,968	139,200
	$ 176,293	$ 178,525
Less allowances for depreciation	15,156	20,692
	$ 161,137	$ 157,833
Land	17,349	17,349
TOTAL PROPERTY, PLANT, AND EQUIPMENT	$ 178,486	$ 175,182
DEFERRED CHARGES		
Unamortized excess of liabilities over assets of predecessor partnership—Note O	$ 70,041	$ 66,289
Engineering and proposal costs—Note P	27,185	62,603
TOTAL DEFERRED CHARGES	$ 97,226	$ 128,892
	~~$1,130,466~~	~~$1,247,731~~
	758,329	875,594

See notes to financial statements.

UNIVERSAL ECSCO CORPORATION

STATEMENT OF FINANCIAL POSITION

LIABILITIES

	August 31, 1960	November 30, 1960 (Unaudited)
CURRENT LIABILITIES		
Note payable to bank—unsecured	$	$ 200,000
Trade accounts payable	700,268	517,256
Bank checks outstanding, less cash on deposit ($30,816) as reported by bank	49,817	
Equipment purchase contracts, secured by equipment (August 31, 1960—$84,206; November 30, 1960—$86,250)	35,044	32,024
Salaries and wages, pay roll taxes, and amounts withheld from employees—Note Q	143,010	118,600
Taxes, other than pay roll taxes and taxes on income	2,331	
Current maturities on long-term debt	2,513	2,672
TOTAL CURRENT LIABILITIES	$ 932,983	$ 870,552
DUE TO PARENT COMPANY		325,000
LONG-TERM DEBT—less current maturities—Note N	224,477	223,834
TOTAL LIABILITIES	$1,157,460	$1,419,386

DEFICIENCY IN ASSETS

CAPITAL STOCK		
Preferred Stock, par value $10 a share:		
Authorized—20,000 shares; issued—none		
Common Stock, par value $1 a share:		
Authorized—1,500,000 shares; issued and outstanding 331,000 shares—Notes N and R	$ 331,000	$ 331,000
Less excess over net assets of predecessor partnership of par value of Common Stock issued therefor	331,000	331,000
RETAINED-EARNINGS DEFICIT (deduction)	$ ~~(26,994)~~ (399,131)	$ ~~(171,655)~~ (543,792)
TOTAL DEFICIENCY IN ASSETS	$ ~~(26,994)~~ (399,131)	$ ~~(171,655)~~ (543,792)
CONTINGENT LIABILITIES—Notes Q and S		
	$1,130,466	$1,247,731

See notes to financial statements.

UNIVERSAL ECSCO CORPORATION

STATEMENT OF INCOME AND RETAINED-EARNINGS DEFICIT

Period of four months ended August 31, 1960, and
Period of seven months ended November 30, 1960

AND

ECSCO (A PARTNERSHIP)

STATEMENT OF INCOME

Period from April 14, 1958 to April 30, 1960

	ECSCO (A Partnership)			Universal Ecsco Corporation	
	April 14, 1958, to December 31, 1958	Year ended December 31, 1959	Period of four months ended April 30, 1960	Period of four months ended Augst 31, 1960	Period of seven months ended November 30, 1960 (Unaudited)
Net sales of completed contracts	$ 5,613	$551,670	$191,805	$1,829,042	$1,898,557
Costs and expenses:					
Cost of completed contracts—Note M	$27,974	$549,620	$259,045	L1 2,188,384 ~~$1,816,247~~	$2,012,010
Amortization of organization expense				5,003	8,755
Interest on long-term debt		278	603	3,779	7,030
Other interest	49	2,941	16,090	31,007	42,417
	$28,023	$552,839	$275,738	$1,856,036	$2,070,212
Net loss	$22,410	$ ~~1,169~~ L3 $130,604	$ 83,933		
Net loss for period and retained-earnings deficit at end of period				L2 399,131 $ ~~26,994~~	$ 171,655

See notes to financial statements.

NOTES TO FINANCIAL STATEMENTS

(Insofar as applicable to dates and periods subsequent to August 31, 1960, these notes are not covered by the report of independent accountants.)

Note M—Contracts in Process

Contracts in process are stated on the basis of accumulated costs, but not in excess of estimated recoverable amounts. The Company has followed a method of accounting whereby no income is reported on any contract until the contract is substantially complete. Under such method of accounting, all costs including administrative and general expenses are considered as contract costs and are allocated to contracts in process as incurred.

Note N—Long-Term Debt

Long-term debt consists of the following:

	August 31, 1960		November 30, 1960	
	Current Maturities	Due After One Year	Current Maturities	Due After One Year
6% Five Year Convertible Debentures....	$ —	$200,000	$ —	$200,000
Trust deed note payable, secured by land and building, payable $250 monthly including interest at 6%	1,650	21,602	1,809	21,175
Trust deed note payable, secured by improvements, payable $72 monthly including interest at 5%	863	2,875	863	2,659
	$2,513	$224,477	$2,672	$223,834

The 6% Five Year Convertible Debentures were issued in two series of $100,000 maturing April 28, 1965, and June 14, 1965, respectively. The Debentures are convertible into Common Stock at the price of $2 a share. Such conversion price is subject to downward adjustment should the Company (a) issue, or agree to issue under options or rights, shares of Common Stock for less than the conversion price in effect immediately prior to the time of such issue, or (b) issue Common Stock in subdivision of outstanding Common Stock. At August 31, 1960, and November 30, 1960, 100,000 shares of Common Stock were reserved for conversion, based upon the initial conversion price. Under terms of the Debentures, the Company may not pay cash dividends as long as any of the Debentures remain outstanding. Reference is made to Note B to statement of financial position of Shinn Industries, Inc.

Note O—Excess of Liabilities Over Assets of Predecessor Partnership

The Company was incorporated on April 22, 1960, and commenced operations on May 1, 1960, when it acquired the assets and assumed the liabilities of Ecsco (a partnership) in consideration of the issuance of 331,000 shares of its Common Stock. Liabilities assumed exceeded assets acquired by $75,044. Such amount has been capitalized, and is being amortized over a period of sixty months.

Note P—Engineering and Proposal Costs

Engineering and proposal costs represent costs ($23,650 at August 31, 1960; $63,068 at November 30, 1960) attributable to the development of eight new products and costs ($3,535) incurred relating to the submission of a bid proposal. The engineering costs on new products will be amortized over a period not exceeding sixty months, and proposal costs will be charged as cost of future contracts.

Note Q—Delinquent Pay Roll Taxes

At August 31, 1960, and November 30, 1960, the Company was delinquent in the payment of pay roll taxes and withholding taxes in the amounts of $58,909 and $83,835, respectively. Provision has

been made for related interest on such delinquency. The Internal Revenue Code of 1954 provides for various penalties in case of delinquencies in payment, the most severe of which is 100% of the delinquent tax. The Company does not believe that any such penalties will be imposed.

NOTE R—COMMON STOCK

All outstanding shares of Common Stock have been deposited in escrow and may not be sold or transferred without the written consent of the Commissioner of Corporations, State of California.

NOTE S—CONTINGENT LIABILITIES

Subsequent to August 31, 1960, the Company incurred costs ($213,984 at November 30, 1960; $279,430 at January 31, 1961) in order to assure completion of a subcontract. Pursuant to an agreement with the subcontractor, relating to these costs, the Company is to be reimbursed for such funds expended. It is the opinion of management and legal counsel that such costs will be recovered from the subcontractor.

The Company has been billed by such subcontractor for additional amounts ($132,293 at August 31, 1960, $226,914 at November 30, 1960 and $241,217 at January 31, 1961) expended by him in excess of amounts authorized under terms of the applicable contract. In addition, an unrelated claim based on alleged breach of contract has been made against the Company by a vendor in the sum of $20,589. No provision for such amounts has been made in the accompanying financial statements as it is the opinion of management and legal counsel that there is no basis for the claims.

The Company is also contingently liable to the extent of advances made (approximately $160,000 at August 31, 1960, and $40,000 at November 30, 1960) on unpaid balances of accounts assigned to a factor.

NOTE T—POLICY RELATIVE TO DEPRECIATION, ETC.

Depreciation of property, plant, and equipment was provided for in amounts sufficient to amortize the cost of depreciable assets over their useful lives. Estimated useful lives were as follows:

	Range
Building and improvements	20 years
Machinery and other equipment	4 to 10 years

Depreciation rates based upon the aforementioned lives were applied by the straight line method.

Maintenance and repairs were charged against operations. Renewals and betterments were capitalized.

When assets are disposed of, allowances for depreciation will be charged with the accumulated depreciation and the resulting profits and losses will be transferred to the income account, or, in the case of a trade, to adjust the cost of the acquired assets.

NOTE U—SUPPLEMENTARY PROFIT AND LOSS INFORMATION

The following tabulation sets forth the amounts of certain classes of expenses incurred during the period:

	Charged Directly to Cost of Products and Services Sold
From April 14, 1958, to December 31, 1958:	
Maintenance and repairs	$ 179
Depreciation	952
Taxes, other than taxes on income:	
Pay roll taxes	178
Other taxes and licenses	21
Rents	2,225

NOTES TO FINANCIAL STATEMENTS—(Continued)

NOTE U—SUPPLEMENTARY PROFIT AND LOSS INFORMATION—(Continued)

	Charged Directly to Cost of Products and Services Sold
Year ended December 31, 1959:	
Maintenance and repairs	$ 1,128
Depreciation	1,146
Taxes, other than taxes on income:	
Pay roll taxes	10,858
Local property taxes	526
Other taxes and licenses	321
Rents (including equipment rentals)	7,901
Period of four months ended April 30, 1960:	
Maintenance and repairs	2,417
Depreciation	6,061
Taxes, other than taxes on income:	
Pay roll taxes	17,361
Other taxes and licenses	103
Rents (including equipment rentals)	9,624
Period of four months ended August 31, 1960:	
Maintenance and repairs	2,084
Depreciation	6,997
Taxes, other than taxes on income:	
Pay roll taxes	19,796
State franchise tax	100
Local property taxes	388
Other taxes and licenses	145
Rents (including equipment rentals)	14,662
Period of seven months ended November 30, 1960 (Unaudited):	
Maintenance and repairs	3,354
Depreciation	12,533
Taxes, other than taxes on income:	
Pay roll taxes	26,233
State franchise tax	100
Local property taxes	971
Other taxes and licenses	4,464
Rents (including equipment rentals)	21,371

There were no management and service contract fees or royalties incurred during the period.

APPENDIX B

COMMENTS OF TRIAL JUDGE AT CONCLUSION OF TRIAL

Findings of fact in this case have been voluntarily waived. The remarks which I am going to make will not be construed as findings of fact but as comments of mine on the case. They are extemporaneous and informal and not intended to be comprehensive.

The case took a long time to try, but the decision of it gets down to a few relatively simple issues.

First, were false and misleading financial statements prepared for the periods mentioned in the indictment?

Second, if so, as to each defendant, did he cause them to be prepared and know they were false and misleading?

Third, if the foregoing is answered in the affirmative, did each defendant, with particular reference to Counts Two, Three and Four, knowingly and wilfully cause the false and misleading financial statements to be filed with the SEC for the purpose of offering securities of Shinn Industries, Inc. to the public?

Fourth, as to Count One, did the defendants conspire to defraud the United States by impeding and obstructing the lawful function of the SEC and conspire to commit all or any of the other substantive offenses charged in Count One?

Applying the requirement that each element of the crimes charged must be proved beyond a reasonable doubt, I

have determined that all of these questions can and must be answered in the affirmative as to each defendant.

It is abundantly clear that the financial statements for the year ending December 31, 1959, and for the four months period ending August 31, 1960, were false, misleading and fraudulent. Each substantially overstated the results of the company's operations for the period covered. Each showed a loss, but if the true facts had been reflected, a very much larger loss would have been shown in each case.

For the year end 1959, if the true facts had been reflected, the loss would not have been the small amount of eleven hundred-odd dollars as shown in the Registration Statement, but in the neighborhood of $130,000 or more. For the four months ended August 31, 1960, if the true facts had been reflected, the loss would have been not the twenty-six thousand nine hundred odd dollars as shown in the Registration Statement, but almost $400,000.

These overstatements of results, or to put it the other way, these substantial understatements of losses were accomplished by false and fraudulent means. For the year ending 1959 it was accomplished by purported cancellation of a very large account payable to a creditor, Condeco, accompanied by phony and false credit memoranda which the creditor never saw and which were prepared in defendants' offices -- that is, never saw before preparation. The creditor was given other sources for payment later. The loss was thus not reflected in the period in

which it was incurred and was pushed over to a later accounting period. The defendants knew, as I see this case, that their financial statement for the period was thus rendered false and misleading.

The Kansas City job accounted for the overwhelming part of the business done during that period. The defendants knew that they had incurred a whopping loss, well in excess of $100,000, on Kansas City, but nevertheless permitted the accounting statements to be issued and to be used as part of the later Registration Statement, showing a loss of only eleven hundred-odd dollars.

For the four months ending August 31, 1960, the over-statement of results was accomplished by a reallocation of costs of over $300,000 incurred for the Philadelphia Post Office job, to three new and uncompleted jobs, New Orleans, Houston and Portland. This result was achieved by substituting new pages in the books of account, by changing column headings, by adding new allocation figures and other false and fraudulent methods.

I have no doubt from the evidence presented to me that the defendants instructed and directed that this be done. It may be that they did not see the individual altered entries, the precise new figures, and so forth. But that is really immaterial. The defendants were interested only in the total result, and that is that the great losses they knew had been incurred on Philadelphia be vastly minimized so that the results of operations as reflected

in the accounting statements for the period would present as favorable a picture as possible.

Defendants knew that the Philadelphia contract had turned out to be a fiasco. They knew that their business was on the rocks and the only possible way it could be kept alive and perhaps salvaged was by a massive infusion of equity capital from public financing. They knew that would be impossible if the true losses were shown.

Now, true, the method they directed for obscuring the facts did not succeed in hiding the losses forever. The losses were only transferred to later periods. But by that time, they figured that the public financing would be completed. They may each have hoped and expected that the new Post Office contracts would be very profitable and so that the losses previously incurred could be made up by profits from the new jobs. But that is not material. In their desperation to hide their true financial picture, they knowingly and intentionally took the risk of causing to be prepared, circulated and published, false financial statements for the periods involved.

Now, defendants point to the fact that other various people had advanced substantial funds to the business and thus their situation was not as desperate as the Government painted. This argument is not convincing. All of these other funds were short-term and/or in contemplation of the public financing. If the public financing fell through, the defendants were well aware that all was lost and they were willing to go and did go to

any lengths to get it through.

Defendants have contended in the trial that the year end 1959 statement was not prepared and the Condeco reversal of the account payable was not done, with any view of obtaining public financing and thus, they argue, cannot be considered as evidence of crimes charged against them.

First, this contention is, in my view, not factually correct. I am convinced that they well knew at that time the necessity of public financing and contemplated it; that is, at the time when the acts were done and the financial statement prepared.

But even if the contention is factually correct, it avails them nothing. One can prepare a false financial statement for another purpose unrelated to public financing in the Registration Statement, but if he presents and publishes it as a part of a Registration Statement later on, knowing it to be false, it is evidence of the commission of the substantive offenses as charged here.

I think I ought to say a word about the so-called "claims issue." Defendants have argued, in effect, that the financial statement for August 31, 1960, wasn't really false because they had a claim against the Post Office Department for breach of contract which would have made up for the over $300,000 of Philadelphia costs falsely reallocated to other jobs. That is not, in my view, a persuasive argument. They may have believed that the Post Office Department had breached its contract in various

ways. But a potential claim, of uncertain amount and uncertain recovery, which could not have been presented or even compiled on August 31, 1960, clearly is not and was not an asset, as of August 31st, under good accounting practices. This claim argument is probably an after-thought on the part of defendants to escape the criminal onus of their wilful falsifications. It certainly does not constitute a defense.

The evidence demonstrates the guilt of both defendants. They were equal partners with equal control and equal responsibility in the business. Decisions were equally shared. The instructions to manipulate the books may have been uttered by one, but in the presence of the other, and surely with the other's full knowledge, participation and concurrence. The conspiracy between them has been proved, as well as their joint culpability in each of the substantive counts.

One more word. I have carefully observed the demeanor of each witness and analyzed the testimony of each in terms of whether it is corroborated or contradiced by the testimony of other witnesses.

I believe the testimony of Mr. Kavert and that of the other Government witnesses which corroborate his testimony in various ways. I did not believe the defendants as to the important facets of their testimony. They attempted to give the impression in this case that they knew nothing of accounting, knew nothing of profits or losses, never relied on their accounting department or personnel, didn't understand financial statements,

including the net loss figures shown.

These gentlemen owned the business. Everything they had was at stake. But to hear them tell it, one would believe that their interest in their own accounting department was confined to saying, "Good morning." They would have us believe that they didn't know what was going on and didn't want to know; that the accounting department was operating in kind of a vacuum without control or direction, that the accounting department turned out figures and financial statements were then prepared based on the figures which the defendants accepted without really looking at them.

Along this same line, defendants appear to be saying that outside accounts were employed, and if these outside accounts said the financial statements were right, they, as owners, were relying on the outside accounts and their figures, and whatever happened is all the outside accounts fault. This posture and position defies rational belief and is not in accordance with the known facts.

[Reporter's Transcript of Proceedings, p. 2542, line 6, through p. 2549, line 24.]